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"Location, Location, Location" Should Be "Environment, Environment, Environment": A Market-Based Tool to Simplify Environmental Considerations in Residential Real Estate

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**“LOCATION, LOCATION, LOCATION”
SHOULD BE “ENVIRONMENT,
ENVIRONMENT, ENVIRONMENT”:
A MARKET-BASED TOOL TO SIMPLIFY
ENVIRONMENTAL CONSIDERATIONS
IN RESIDENTIAL REAL ESTATE**

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ABSTRACT: ENVIRONMENTAL CONSIDERATIONS IN RESIDENTIAL
REAL ESTATE

The most important rule of real estate (location, location, location) should be upgraded to the three E's: environment, environment, environment. What we value in real estate is the natural and human environment of a site and its structures. A home is typically an American's most significant asset; thus, environmental issues should be of interest, primarily because the effects of environmental degradation can cause devaluation while simultaneously imposing substantial expenses (such as cleanup, health care, and relocation) on the population. The real costs of ignoring the environment are life-threatening health and safety issues, including lung damage and cancer resulting from radon exposure, (which the EPA estimates kills 20,000 people per year¹), and indoor air pollution (from Volatile Organic Compounds (VOCs), for example), the effects of mold and polluted water, and heart and lung conditions related to poor air quality, result in thousands of premature deaths each year.²

Environmental issues include both anthropogenic sources and naturally occurring phenomena. The problem is that, for some buyers, sellers and professionals, obtaining accurate data is difficult. Many know there are issues, but they are unable to get straight-forward, manageable information. Some do not want to know of the issues, and others are overwhelmed. Complicating the matter for everyone is the reality that the laws related to disclosure and duties to prevent or mitigate harm vary significantly by jurisdiction, creating unpredictable rights and duties that range from caveat emptor to duties of reasonable inquiry. Consistency between jurisdictions is of greater importance than ever because of the mobility of the population. Even with guidance and reports from the EPA, the tools available to the majority of individuals seeking to make

¹ See *A Citizen's Guide to Radon*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/radon/pubs/citguide.html (last updated July 23, 2012). Both the Surgeon General and EPA recommend that all homes be tested for radon, often through an inexpensive kit.

² For example, the Environmental Protection Agency estimates that the Cross-State Air Pollution Rule alone will prevent 13,000 to 34,000 premature deaths. *Cross-State Air Pollution Rule (CSAPR)*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/airtransport/ (last updated June 8, 2012) (note that this rule has been blocked by the U.S. Court of Appeals for the D.C. Circuit, *EME Homer City Generation, L.P. v. EPA* (#11-1302 et al. (Aug. 21, 2012)). For extensive data on health effects of pollution, see *Environmental Assessment*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/ncea/ (last updated Aug. 6, 2012); *Children's Health*, U.S. ENVTL. PROT. AGENCY, cfpub.epa.gov/ncea/CFM/nceaQFind.cfm?keyword=Children%27s%20Health (last updated Aug. 12, 2010); Donald T. Wigle & Daniel Krewski, *Introduction, Children's Health and the Environment: Review of Certain Chemicals and Canadian Governmental Policies*, 10 J. TOXICOLOGY & ENVTL. HEALTH 1 (2007), available at www.tandfonline.com/doi/abs/10.1080/10937400601034555.

this most significant purchase, the real estate market does not address the health and safety risks caused by environmental degradation.

Given this deficit in information, we propose a voluntary checklist to alert consumers, owners, and professionals of environmental issues that can impose significant costs for health care, remediation, and property devaluation. Knowledge of the issues should reduce disputes, and, over time, consumers may demand properties that are safer, with economic variables that are better quantified. That in turn should encourage sellers, builders and producers to satisfy the expectations of the consuming public with greener and more sustainable housing.

I. INTRODUCTION

The most important rule of real estate (location, location, location) should be upgraded to the three E's: environment, environment, environment. Environmental issues should be of interest since the effects of environmental degradation can cause devaluation while simultaneously imposing substantial expenses (such as cleanup, health care, and relocation) on the population.

The real costs of ignoring the environment are significant health and safety issues. The effects of polluted water and poor air quality result in thousands of premature deaths, in addition to illness, injury and lost productivity.³

Environmental issues affecting real estate include not just naturally occurring phenomena, which in many instances are exacerbated by anthropogenic factors, but also include purely anthropogenic causes of pollution. For example, in coastal areas, the dramatic effects projected for climate change, including rising sea levels, will inundate both developed and undeveloped real estate.⁴ Other environmental concerns

³ *See id.*

⁴ *See California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at *43, *47 (N.D. Cal. Sept. 17, 2007) (outlining the claimed damages; the case was dismissed by plaintiffs while on appeal to the Ninth Circuit); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *Comer v. Murphy Oil USA*, 585 F.3d 855, 859, 861 (5th Cir. 2009) ("The plaintiffs allege that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gases that contributed to global warming . . . that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs' private property, as well as public property Additionally, the plaintiffs' . . . claim asserts that certain defendants artificially inflated the price of petrochemicals, such as gasoline, . . . [and that] certain defendants were aware for many years of the dangers of greenhouse gas emissions, but they unlawfully disseminated misinformation about these dangers . . . to decrease public awareness of the dangers of global warming . . . [and] to divert attention from the dangers of global warming, so as to dissuade government regulation...and that plaintiffs suffered injuries as a result"), *vacated, en banc reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, 131 S. Ct. 902 (2011); CYNTHIA ROSENZWEIG ET AL., N.Y. STATE ENERGY

affecting real estate include radon, cut-and-filled land, substrate, which can cause structural stability issues or create a “surprise” regional landfill, asbestos, lead, treated wood, mold, flooding, wildfire, wastewater, and surface-water and drinking-water issues (both quantity and quality). Often, these issues are not disclosed to home buyers, sometimes intentionally. In one author’s home town, a huge five-acre to eight-acre crude-oil sump partitioned by wire fences and warning signs vanished in a short time into vacuum trucks, only to be replaced by scores of “little pink houses,”⁵ the owners of which probably have no idea of the site’s history.

The public is increasingly aware that positive environmental aspects, such as view, proximity to clean water, healthy forests, crops unharmed by air or soil pollution, good land-use practices, green space, and clean air to breathe are actually valuable amenities. Econometric studies have shown that riparian properties are worth more when adjacent waters meet water quality standards.⁶ Public transportation, bike paths and other pedestrian friendly amenities, green building techniques, and aesthetics can also add value. Negative environmental factors, led by health and safety concerns, such as industrial or agricultural nuisances, polluted natural features, traffic and natural or man-made hazards can simultaneously depress real estate value while adding costs.

RESEARCH & DEV. AUTH., RESPONDING TO CLIMATE CHANGE IN NEW YORK STATE: THE CLIMAID INTEGRATED ASSESSMENT FOR EFFECTIVE CLIMATE CHANGE ADAPTATION (2011), *available at* www.nyserda.ny.gov/Publications/Research-and-Development/Environmental/EMEP-Publications/~media/Files/Publications/Research/Environmental/EMEP/climaid/responding-to-climate-change-synthesis.ashx (see particularly pages 20 through 23). *See also* CAL. NATURAL RES. AGENCY & CAL. ENERGY COMM’N, 2009 CALIFORNIA CLIMATE ADAPTATION STRATEGY (2009), *available at* www.energy.ca.gov/2009publications/CNRA-1000-2009-027/CNRA-1000-2009-027-D.PDF; N.C. LEGISLATIVE COMM’N ON GLOBAL CLIMATE CHANGE, FINAL REPORT TO THE GENERAL ASSEMBLY AND THE ENVIRONMENTAL REVIEW COMMISSION (2010), *available at* www.ncleg.net/documents/sites/committees/LCGCC/Commission%20Report%202010/LCGCC%20Final%20Report%205-20-10.pdf.

⁵ JOHN COUGAR MELLENCAMP, *Little Pink Houses*, on UH-HUH (Riva Records 1983).

⁶ U.S. ENVTL. PROT. AGENCY, BENEFIT OF WATER POLLUTION CONTROL ON PROPERTY VALUES, EPA-600/5-73-005 (1973), *available at* [yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0009.pdf/\\$file/EE-0009.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0009.pdf/$file/EE-0009.pdf); Christopher G. Leggett & Nancy E. Bockstael, *Evidence of the Effects of Water Quality on Residential Land Prices*, 39 J. ENVTL. ECON. & MGMT. 121, 144 (2000); Jill Jentes Banicki, *Hot Commodity: Cleaner Water Increases Lake Erie Property Values*, TWINE LINE, Summer/Fall 2006, at 3, *available at* ohioseagrant.osu.edu/_documents/twineline/v28i4.pdf; P. Joan Poor et al., *Exploring the Hedonic Value of Ambient Water Quality: A Local Watershed Based Study*, 60 ECOLOGICAL ECON. 797, 806 (2007); Carol Streiner & John Loomis, *Estimating the Benefits of Urban Stream Restoration Using the Hedonic Price Method*, 5 RIVERS 267 (1996); JOHN C. AUSTIN ET AL., AMERICA’S NORTH COAST: A BENEFIT-COST ANALYSIS OF A PROGRAM TO PROTECT AND RESTORE THE GREAT LAKES (2007), *available at* www.healthylakes.org/site_upload/upload/America_s_North_Coast_Report_07.pdf; PHILA. WATER DEP’T, CITY OF PHILA., GREEN CITY, CLEAN WATERS (2009), *available at* www.phillywatersheds.org/lcpcu/LTCPU_Summary_LoRes.pdf.

Informed buyers avoid blighted properties because of concerns of health and devaluation. Even sites that have been remediate are avoided by the informed buyer because of the “stigma” effect (think of the histories of Times Beach, Missouri, and the unforgettable Love Canal (see the Love Canal property acquisition legislation at 42 U.S.C. §9661)). Real estate value is also affected by environmental issues related to structure, such as suitability due to fill and substrate issues, lead-based paint, radon, toxic materials, water intrusion of various types, and mold. Consider the problem of synthetic stucco. While perhaps suitable in dryer climates as a building material, in moist environments, the space behind the stucco traps moisture, allowing mold to grow. When selected as a building material in unsuitable environments, litigation and re-siding can amount to a cost usually exceeding \$25,000.⁷

Real estate appraisers factor the above when valuing property.⁸ In a commercial transaction, environmental site assessment is an essential element of the deal because there are significant risks and costs to the buyer if even a single underground storage tank (UST) is later discovered. In a commercial transaction, it is routine for the buyer or lessee to secure a “Phase 1,” or “All Appropriate Inquiry” (see ASTM §§1527-1528, American Society for Testing Materials), to address environmental issues and to preserve some statutory liability shields (such as the Comprehensive Environmental Response, Compensation, and Liability Act).⁹ It is unrealistic, however, to expect that the public

⁷ See C. Allen Gibson, *Effective Mediation Techniques in Complex Multiparty Synthetic Stucco Cases*, in AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON CONSTRUCTION ARBITRATION AND ADR (2d ed. 2010); N.C. REAL ESTATE COMM’N, NORTH CAROLINA RESIDENTIAL PROPERTY AND OWNERS ASSOCIATION DISCLOSURE FORM REC 4.22 (2011), available at www.ncrec.state.nc.us/forms/rec422.pdf. In North Carolina, synthetic stucco must be disclosed if it was ever on the structure. *Id.* ¶ 1.a.

⁸ FANNIE MAE, UNIFORM RESIDENTIAL APPRAISAL REPORT (FORM 1004) 4 (2005), available at www.efanniemae.com/sf/formdocs/forms/pdf/sellingtrans/1004.pdf (“The appraiser has noted in this appraisal report any adverse conditions (such as needed repairs, deterioration, the presence of hazardous wastes, toxic substances, etc.). . . . Unless otherwise stated in this appraisal report, the appraiser has no knowledge of any hidden or unapparent physical deficiencies or adverse conditions of the property (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental conditions, etc.) that would make the property less valuable, and has assumed that there are no such conditions and makes no guarantees or warranties, express or implied. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, this appraisal report must not be considered as an environmental assessment of the property.”).

⁹ A detailed discussion of the impact of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) and the Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. §§ 9603 et seq.) is part of the residential liability picture, but outside the scope of this Article. The exemptions are familiar, however: See U.S. ENVTL. PROT. AGENCY,

will ever voluntarily spend money at commercial rates for environmental assessments, but there are alternative ways for this segment of the market to make informed purchases if the parties know where to look.

The legal picture, like the weather, is variable all over the map and far less predictable than most would like it to be. While New York, Massachusetts and a few other states may continue to utilize caveat emptor in some residential real property contexts, the common law is ever-changing. Legislatures are also tinkering with liability, disclosure and regulation of the field. Unfortunately, this patchwork of legal protection lags behind market needs, especially at a time when the baby boomer population is retiring, consolidating, and moving for opportunity.

Interestingly, a common thread in this legal patchwork seems to be that, if a prospective purchaser raises an issue, the inquiry may *ipso facto* become a material issue; in this case, if the seller or its agents respond (and they may be compelled to by statute or regulation), the inquiry may trigger a duty for the buyer's agent, the seller, and its agents to provide truthful and complete responses.¹⁰ If a seller or agent knows of an issue,

Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Common Elements Guidance) (2003), *available at* www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf, which suggests that an inspection meeting the All Appropriate Inquiry (AAI) standard, among other things, must be accomplished to secure these defenses. Residential homeowners who cannot qualify because they did not do an All Appropriate Inquiry, for example, can take umbrage at the Environmental Protection Agency's Policy Toward Owners of Residential Property at Superfund Sites, issued July 3, 1991. *See* www.epa.gov/compliance/resources/policies/cleanup/superfund/policy-owner-rpt.pdf. An inquiry is an integral part of the value: the Appraisal Institute filed the following comment in support of new rules on Credit Risk Retention:

We also support the proposed rule's requirements relating to environmental hazards and potential impacts on market value. However, we believe the Final Rule could be enhanced with a requirement that review of environmental assessments be provided to appraisers prior to the letting of the appraisal assignment. Generally, it is preferable for the appraiser to be provided a copy of any environmental assessment so that market impacts can be thoroughly analyzed. However, we understand that many banks separate the appraisal and environmental functions and accept appraisals of property with a hypothetical condition—"as if clean"—when the environmental assessment may say otherwise. Collateral risks can be dramatically reduced if all information relating to the property [is] provided to, and analyzed by, the appraiser. As such, we urge expansion of these provisions to require delivery of the environmental site assessment to the appraiser where environment impacts are found.

Letter from Appraisal Institute, to Jennifer J. Johnson, Board of Governors of the Federal Reserve System (Aug. 1, 2011) (on file with author), *available at* www.sec.gov/comments/s7-14-11/s71411-246.pdf.

¹⁰ N.C. GEN. STAT. ANN. § 93A-6 (a)(1), (8), (10) (Westlaw 2012). *See* Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 387 nn.42-43 (1995). *See also* RESTATEMENT (SECOND) OF TORTS § 209 (1989); 37 AM. JUR. 2D *Fraud & Deceit* §§ 167, 200-209.

that knowledge may trigger the disclosure of known but previously unappreciated facts. It may also require the seller or the agent to make a reasonable inquiry on the buyer's behalf.

A. THE REGULATED COMMUNITY

The positive aspects of “going green”—even during hard times—have not been lost on real estate interests and builders, who also seek to avoid liabilities. Interest by real estate licensees centers on the following:

1. *Liability: Regulatory, Civil and Criminal*: Increasingly, the public expects the real estate professional to know environmental issues. The listing agent and the buyer's agent alike have duties of disclosure and due diligence that are relatively recent and continually evolve through science, case law, regulation, and statute. Even in states where common law liability is limited, statutory and regulatory rules often require diligence on the part of agents.

2. *Green Selling Points: Green Certificates and Professionalism (and a Higher Standard of Care)*: Although limited, there are a classes offered to the profession that¹¹ offer a practical introduction to the field, but principally from the standpoint of avoiding liability. As marketers, some agents recognize the opportunity to build a loyal client base through thorough training in these important elements of value. The National Association of Realtors® (NAR) does offer an entire Green Designee process,¹² and the Green Building Certification Institute offers a LEED® Green Associate designation for professionals.¹³ Another

¹¹ MARIE SPODEK & BILL MAGARGAL, ENVIRONMENTAL ISSUES IN YOUR REAL ESTATE PRACTICE (2d ed. 2005).

¹² GREEN RES. COUNCIL, NAT'L ASS'N OF REALTORS®, *How to Get NAR's Green Designation*, www.greenresourcecouncil.org/how_to_get_nars_green_designation.cfm (last visited June 22, 2012); GREEN RES. COUNCIL, NAT'L ASS'N OF REALTORS®, *Why Earn NAR's Green Designation Requirements*, www.greenresourcecouncil.org/earn_nars_green_designation.cfm (last visited June 22, 2012); GREEN RES. COUNCIL, NAT'L ASS'N OF REALTORS®, *NAR Green Designees Simplify Going Green*, www.greenresourcecouncil.org/why_use_an_nar_green_designee.cfm (last visited June 22, 2012); GREEN RES. COUNCIL, NAT'L ASS'N OF REALTORS®, *Find Your Carbon Footprint*, www.greenresourcecouncil.org/find_your_carbon_footprint.cfm (last visited June 22, 2012) (providing advanced training in green building and sustainable business practices so that one can seek out, understand, and market properties with green features).

¹³ Leadership in Energy and Environmental Design (LEED®) Green Associate, one of several LEED® certifications, and the certification for any professionals who want to demonstrate green building expertise in non-technical fields of practice such as green design, construction and operations. See www.gbci.org/org-nav/about-gbci/about-gbci.aspx (last visited June 22, 2012). A green designee realtor can help obtain a LEED® certification for homes through a third party that will set design, construction, and operation standards for high performance in green building. LEED® Green Associate: For any professionals who want to demonstrate green building expertise in non-technical fields of practice. The certification denotes basic knowledge of green design,

option is a private certification called “EcoBroker.”¹⁴ However, acceptance of these labels is not yet widespread.

Builders have also recognized the value of green practices and have felt the sting of environmental liability for sites, products, and practices ranging from underground storage tanks (USTs) to “synthetic stucco.” LEED® certification has become an industry buzzword. The certification attempts to link the recommended practices to anticipated benefits, such as how better storm water management can have a positive impact on water quality, wetlands and resulting values and tax rates. Green building alliances are growing and proliferating. More conventional builders are edging into the field as another draw in a down economy, and, at the other extreme, there are “green craftspeople.”¹⁵ Claims to expertise will naturally result in an expectation of a higher standard of care. However, as a whole, the real estate professions, including lenders, builders and developers, have been reticent to address environmental issues in transactions.¹⁶

Given the shortcomings in legislative and common law protections, the limits of education as a tool to reach professionals and consumers, and the use of undefined buzzwords such as “green,” what is the best way to enable buyers, especially non-commercial buyers, to make informed purchases? We offer several suggestions to achieve a better informed market.

a) *Informational Tools:*

1) *Self-Help:* These are generally designed for consumers and offered by the EPA, the states, trade associations and NGOs (e.g., Scorecard, scorecard.goodguide.com/, EPA.gov).¹⁷ Site-specific information is often available through the EPA and other layers of

construction and operations. Certification issues through Green Building Certification Institute. *About GBCI*, GREEN BUILDING CERTIFICATION INSTITUTE, www.gbci.org/org-nav/about-gbci/about-gbci.aspx (last visited June 22, 2012).

¹⁴ ECOBROKER®, www.ecobroker.com/ (last visited June 22, 2012).

¹⁵ For example, the Wilmington, North Carolina-based CAPE FEAR GREEN BUILDING ALLIANCE, cfgba.org (last visited June 22, 2012).

¹⁶ For example, the National Association of REALTORS® has championed disclosure statutes that limit broker liability. Of course, builders and developers are concerned about environmental issues but resist more regulation even for a unique hazard like proximity to the coastal zone. COMMERCIAL ALLIANCE, N.C. ASS’N OF REALTORS®, 2009 LEGISLATIVE SUMMARY 5-6 (2009), available at www.siorcarolinas.com/assets/documents/Legislative%20Update%20for%202009.pdf (opposing beach hazard disclosure legislation). See *Environmental Issues Litigation & Amicus Briefs*, NAT’L. ASS’N OF HOMEBUILDERS, www.nahb.org/reference_list.aspx?sectionID=1169 at nahb.org (last visited June 22, 2012); *Growth & Land Use Issues Litigation & Amicus Briefs*, NAT’L. ASS’N OF HOMEBUILDERS, www.nahb.org/reference_list.aspx?sectionID=1170 (last visited June 22, 2012).

¹⁷ Currently, the Environmental Protection Agency’s home page invites the reader to search for information on “My Environment” by zip code. www.epa.gov (last visited Aug. 4, 2012).

government, and information about pollution and health is also available, although many people will have neither the time nor the expertise to focus on issues of importance to them and to do the research.

2) *Consultants*: Professional services are available, from basic home inspections to sophisticated Environmental Site Assessments (ESAs). Sellers might even order inspections as part of the preparation for sale, as many brokers advise.

3) *Data Sources*: Available resources include dedicated environmental data sources,¹⁸ the local boards of REALTORS®, and Multiple Listing Services.

b) *Regulatory Measures*: Options include (1) licensing and education of brokers; (2) disclosure statutes and allocation of the duties of discovery and disclosure; and (3) regulatory measures that include review of chemicals, building codes, environmental statutes and other real estate-specific measures, such as the ban on lead paint and solder and the associated required disclosures.¹⁹ Universally applicable federal rules, such as those requiring lead disclosures, remain a possibility (for example, the United States Department of Housing and Urban Development's forms), but they seem unlikely in the current Washington partisan environment. Although disclosure requirements are market-based, the real estate industry generally opposes even seemingly sensible disclosures, such as disclosure of ocean hazards, unless the requirement limits liability.²⁰

c) *Dispute Resolution*: As an adjustment mechanism, the legal system can have high transactional costs that discourage even meritorious claims. Parties often do not know or understand their rights, nor do they often have the resources to pursue them. Additionally, insurers, firms and regulatory agencies have put the fear of liability

¹⁸ See ENVTL. RECORD SEARCH, www.reccheck.com/store/shopDisplayCategories.asp (last visited June 22, 2012); ENVTL. DATA RES. INC., www.edrnet.com/ (last visited June 22, 2012); ENVTL. DATA RES. INC., *Environmental Screening for Your Home, Peace of Mind for Your Family*, www.edrnet.com/solutions-for/home-buyers-sellers--agents (last visited June 22, 2012) (offering a \$39.95 starter package); ENVTL. DATA RES. INC., *Environmental Issues Report*, www.environmentalissuesreport.com/sample_report.pdf (last visited June 22, 2012); FIRSTSEARCH ENVTL. INFO., www.efirstsearch.com/index.html (last visited June 22, 2012); My Environment, U.S. ENVTL. PROT. AGENCY, www.epa.gov/myenvironment (last visited June 22, 2012); SCORECARD, scorecard.goodguide.com/ (last visited Aug. 4, 2012).

¹⁹ *Lead*, U.S. ENVTL. PROT. AGENCY, EPA.gov/lead (last updated Apr. 25, 2012); *The Lead Disclosure Rule*, U.S. DEP'T OF HOUS. & URBAN DEV., portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/enforcement/disclosure (last visited June 22, 2012).

²⁰ Robert H. Cutting et al., *Spill the Beans: Good guide, Walmart and EPA Use Information as Efficient, Market-Based Regulation*, 24 TUL. ENVTL. L.J. 291 (2011). See Washburn, *supra* note 10; Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk*, 34 CONN. L. REV. 1 (2001) (for excellent summaries of the trends in regulation).

(especially defense costs) into the hearts of licensees who often do not understand or like to deal with environmental issues.

The quagmire of common law and statutory law results in transactions that are both overly complicated and incomplete as to the information actually exchanged and understood. There is little standardization of the legal theories and resources available throughout the land, even though the population is increasingly mobile.²¹ The purpose of this article is to offer a hybrid tool for agents and the public to identify and learn about environmental issues that may affect properties.²² One of the few common threads that run through the labyrinth of state law is the concept that, when a party raises a particular question, the other parties must respond truthfully and completely, notwithstanding whatever default disclosure is required.²³ In several jurisdictions, if a party raises an issue, it essentially becomes material *ipso facto* and triggers the responsibility to provide truthful and accurate responses.²⁴ That seems reasonable, so we propose a set of issues and questions aimed at both the most common and the most significant environmental issues. Because this would not be a mandatory “disclosure” document, it would be available for anyone to use or disregard as they wish, and it also would not raise all the usual hot-button issues. The checklist could be available online, readily accessible, and contain links to many sources of information. Thus, anyone (seller, buyer or agent) would be easily reminded of issues that are worthy of investigation, even if not covered by state disclosure rules.²⁵

How might such a simple resource affect the rights and duties of the participants? The answer is that offering accessible and organized information is never bad, and having more fully informed agents and consumers should mean fewer disputes in the end. It is also possible that knowledge of the issues will mean that buyers, sellers and brokers will find it more difficult to escape the requirement of due diligence. Better understanding promotes deals that close and stay closed by reducing unknown liability and increasing the number of parties who are satisfied. Ultimately, knowledge will lead to a shift in values and a demand for safer, more sustainable materials and practices. Of course, there is the

²¹ Although once again Scorecard, scorecard.goodguide.com/ and EPA.gov’s “My Environment” feature can provide some solid and uniform information, there is often much more to the local story.

²² We invite critical comment because the goal is to make every phase of a transaction more understandable to all.

²³ Washburn, *supra* note 10, at 386-89.

²⁴ *Id.* at 381 nn.42-50.

²⁵ The authors have developed a web tool for discussion. REAL ESTATE PROPERTY CHECKLIST, www.realsafeenvironment.com (last visited June 26, 2012).

danger of information overload, but there are solutions. Professionals in many technical fields are ready to assist, thus also stimulating the economy. To those who wish the issues would go away, we can only say avoid them at your peril.

II. ENVIRONMENTAL ISSUES ARE SIGNIFICANT TO CONSUMERS

At the top of the list of concerns are health and safety concerns, so consumers do not end up like the landholders in *Erin Brockovich*,²⁶ for example. Marketers also think that consumers are alert to the issues. It is nearly impossible to avoid “green,” “eco-friendly” and other claims, so much so that the FTC has special rules for Green Advertising.²⁷

A. HEALTH AND SAFETY

After *Erin Brockovich* and *A Civil Action*,²⁸ as well as the problems with Three Mile Island and, more recently, with the Fukushima nuclear power plant, environmental health and safety are increasingly issues of popular concern. The EPA has recently released one of several expected in-depth reviews of the health and safety effects of global warming.²⁹ Even those who eschew the label “environmentalist” decry environmental hazards that might affect their families’ health. For example, the State of North Carolina spent years and over \$100 million attempting to site the hazardous waste incinerator, the hazardous waste landfill, and the low-level radioactive materials landfill for the Southeast Regional Compact before actually conceding defeat. It truly seemed to be one of those rare projects that was unpopular with everyone. The real estate profession welcomed the elimination of the risk to health and property value, even though North Carolina was expelled from the Southeast Regional Compact and was sued for millions of dollars by other member states in a case pending until 2011.³⁰ The EPA reports that some 20,000 people die each year of radon exposure; hence, the Surgeon

²⁶ ERIN BROCKOVICH (Universal Pictures 2000) (a film that focused on the health effects on residents affected by the Pacific Gas & Electric chromium-6 water pollution case in California); A CIVIL ACTION (Buena Vista Studios 1998) (the infamous Woburn, Massachusetts, toxic pollution case).

²⁷ Cutting et al., *supra* note 20.

²⁸ ERIN BROCKOVICH *supra* note 26; A CIVIL ACTION, *supra* note 26.

²⁹ *Environmental Assessment*, *supra* note 3; *Children’s Health*, *supra* note 3; *see also* Wigle & Krewski, *supra* note 3.

³⁰ Mr. Cutting served as legislative aide to the state house member and state senator who engineered the derailment of the siting process. Emily Gorman, *State Withdraws from Radioactive Waste Compact: A Victory for REALTORS and Citizens*, TAR HEEL REALTOR® (1999). *See Alabama v. North Carolina*, 130 S. Ct. 2295 (2010).

General has recommended that radon tests be conducted routinely.³¹ Interest is significant in cases of asbestos, mold, water supply, onsite and indoor toxins, air quality (effects on heart and lungs), arsenic, mercury, lead, Persistent Organic Pollutants and even Electro Magnetic Fields³²—just ask anyone who has tried to site a facility that raises these issues.³³ *Consumer Reports* confirms the reasons: “[sixty-five percent, the] percentage of surveyed households with someone who has a health condition affected by indoor air quality.”³⁴ Of course, the public does not always focus on the real risks; instead, the focus is on the popular conception of risk,³⁵ so an organized and uniform effort to provide more information could help participants better evaluate the issues.

B. VALUE

Environmental (location and structure) indicators of value include identifiable effects on market value (through comparable sales), costs to remedy problems and stigma to property.³⁶ It is true that environmental values are not always easy to quantify, not because they do not have value, but because there are no markets for most ecosystem services.³⁷ Ironically, the values may even be inversely proportional, or at least loosely related. In North Carolina, many of the coastal estuarine creeks have been closed to shell fishing because of pollution (runoff); even so, the views are not affected, and there are no dead fish or odors, so the value of water properties has continued to outpace others.³⁸ Houses near

³¹ A *Citizen's Guide to Radon*, *supra* note 1 (Surgeon General Health Advisory: “Indoor radon is the second-leading cause of lung cancer in the United States and breathing it over prolonged periods can present a significant health risk to families all over the country. It’s important to know that this threat is completely preventable. Radon can be detected with a simple test and fixed through well-established venting techniques.”); see *Radon*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/radon (last updated July 19, 2012).

³² *Is Your Home Making You Sick?*, CONSUMER REPORTS, June 2012, at 34-35.

³³ See Gorman, *supra* note 30. Discussions with key private sector managers and regulatory officials with the authors (2008-2011) (on file with authors).

³⁴ *Is Your Home Making You Sick?*, *supra* note 32, at 34-35.

³⁵ STEPHEN BREYER, *BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION passim* (1993).

³⁶ See RICHARD J. RODDEWIG, *VALUING CONTAMINATED PROPERTIES* 20 (2002).

³⁷ Robert H. Cutting, *One Man's Ceiling Is Another Man's Floor: Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819, 838-43 (2001). Failure to internalize is a key reason that the Transformative Economy collides with the Economy of Nature. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442 (1993); Robert Cutting & Lawrence B. Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection*, 22 PACE ENVTL. L. REV. 55, 64-67 (2005); J. B. RUHL ET AL., *THE LAW AND POLICY OF ECOSYSTEM SERVICES* 87-126, 267-70 (2007).

³⁸ WILMINGTON REG'L ASS'N OF REALTORS®, *PRELIMINARY DATA FOR NEW HANOVER COUNTY, N.C.* (Mr. Cutting has been a member since 1995).

storied Santa Monica Bay have not suffered particularly from over twenty years of ocean-water warnings because of contamination from local sewer plants and runoff.³⁹ However, there is a growing body of evidence that clean water has value: values rise once polluted water bodies improve.⁴⁰

C. EXAMPLES: SITE AND STRUCTURE

1. *Site (Including Nearby Properties)*

a) *Uses of Properties in the Vicinity (the local ecology)*: Myriad environmental issues affect the value of a site. Both public and private uses affect property values. These effects can be tangible, visible or intangible (usually economic)—and often some combination of the three. Odors from intensive livestock operations, waste-disposal sites (such as the Toxic Trio in North Carolina, *supra* note 36) and polluted drinking water at military facilities (such as the hazardous substances in the water supply of the major Marine base, Camp Lejeune, in North Carolina), rally even those who recoil at the term “environmentalist.”⁴¹ In fact, siting a facility without controversy seems to be the exception rather than the rule.⁴²

b) *Natural Conditions*: Drainage patterns, proximity to the flood plain, wetlands, soil issues, slopes, faults and even weather patterns such as tornadoes and hurricanes affect value.⁴³ Ironically, the hazards may be so well known to locals that people do not mention what they believe to be obvious (e.g., living in “tornado alley,” in the flood plain in the

³⁹ See MIKE LOVE & AL JARDINE, *Don't Go Near the Water*, on SURF'S UP (Brother/Reprise 1971), available at www.youtube.com/watch?v=7cTIYsvJQk.

⁴⁰ U.S. ENVTL. PROT. AGENCY, *supra* note 6; Leggett & Bockstael, *supra* note 6, at 121–44; Banicki, *supra* note 6; Poor et al., *supra* note 6, at 797–806; Streiner & Loomis, *supra* note 6; AUSTIN ET AL., *supra* note 6; CITY OF PHILA., *supra* note 6.

⁴¹ Congress has just voted some relief for the potentially thousands of people affected by water at Camp Lejeune, North Carolina, contaminated with toxics like TCE for several years, with the passage of House Resolution 1627, 112th Congress (especially § 101 et seq.). See, for example, THE FEW, THE PROUD, THE FORGOTTEN, www.ftptf.com/ (last visited June 26, 2012), a site for marines, former marines and family who were exposed. See also STOP TITAN ACTION NETWORK, stoptitan.org/ (last visited June 26, 2012). Among others in the community alliance, more than 200 physicians publicly joined to seek health-related answers in a Portland cement siting case. stoptitan.org/the-fight/factoids.asp.

⁴² Authors' discussions with key private sector managers and regulatory officials (2008–2011) (on file with authors).

⁴³ Steven D. Shultz & Pat M. Fridgen, *Location In 100/500 Year Floodplains, Floodplains and Housing Values: Implications for Flood Mitigation Projects*, 37 J. AM. WATER RES. ASS'N, 595–604 (2001). See the comments in support of including environmental data in appraisals by The Appraisal Institute, *supra* note 9. See also *Smalls v. Blueprint Dev., Inc.*, 497 S.E.2d 54, 56 (Ga. Ct. App. 1998) (failure to disclose house built on wetlands). See also Roberts, *supra* note 20, at n.6; Washburn, *supra* note 10, at 390.

southeastern United States or almost anywhere along the storied California earthquake zones⁴⁴).

c) *Anthropogenic Conditions*: Impending changes, like a freeway or large industrial site, can be both the reason for sale and a cause for buyers to beware. Brokers report that neither they nor buyers usually ask about possible changes, although many planning departments will readily discuss evolving land uses, and online tools are increasingly available.⁴⁵ Altered drainage, noise, nuisances, hazardous materials,⁴⁶ polluted resources, and proximity to landfills or other controversial land uses affect property value everywhere.⁴⁷ Water-quality impairment—closure of waters to shell fishing or swimming—also affects value.⁴⁸ Even the stigma of problems related to a property can seriously affect value.⁴⁹

d) *Infrastructure*: Quality and quantity of the water supply, wastewater removal, transportation issues (such as construction of new roads or cut-throughs), utility operations and anticipated changes in the area are some of the things that affect value.⁵⁰ Failure or limitation of water supply is becoming more common in the East as it has been in the West. The North Carolina Real Estate Commission reports a 2010 disciplinary case involving a licensee seller who not only provided misleading and incomplete information about her failing wells, but also

⁴⁴ WARREN ZEVON, *Desperados Under the Eaves*, on WARREN ZEVON (Asylum 1976) (“And if California slides into the ocean/Like the mystics and statistics say she will . . .”).

⁴⁵ For example, the federal website USA.gov has links to federal, state, local and tribal agencies and by topic: www.usa.gov/Agencies.shtml, (last visited Aug. 4, 2012).

⁴⁶ Hank C. Jenkins-Smith et al., *Information Disclosure Requirements and the Effect of Soil Contamination on Property Values*, 45 J. ENVTL. PLAN. & MGMT. 323 (2002).

⁴⁷ Robert P. Berrens et al., *The Effect of Environmental Disclosure Requirements on Willingness to Pay for Residential Properties in Borderlands Community*, 84 SOC. SCI. Q. 359 (2003). A growing body of literature has recorded environmental effects of property value in various contexts: neighborhood pollution from concrete & quarrying operation affected value by nearly twenty percent. *Id.*

⁴⁸ See Gibson, *supra* note 7; N.C. REAL ESTATE COMM’N, *supra* note 7; U.S. ENVTL. PROT. AGENCY, *supra* note 6; Leggett & Bockstoel, *supra* note 6, at 121–44; Banicki, *supra* note 6; Poor et al., *supra* note 6, at 797–806; Streiner & Loomis, *supra* note 6; AUSTIN ET AL., *supra* note 6. Note that earlier we said that shellfish health did not seem to affect value in North Carolina. However, these studies indicate that (1) that improvement is measurable when water quality improves, and (2) it makes a difference whether the resource is supported by a significant political force: for example, the shell fishing industry in the Gulf after the BP spill.

⁴⁹ Hans Siemens, *Stigma of Contaminated Land: Difficult to Tackle*, APPRAISAL J. 121 (2003). See also Roberts, *supra* note 20, at 1, 8-9; Paula C. Murray, *AIDS, Ghosts Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689 (1997); Harris Ominsky, *How to Handle Residential Real Estate Disclosure*, 10 PRACTICAL REAL EST. LAW. 65 (1994).

⁵⁰ In the commercial context these issues have been in the trade press for a decade. See, e.g., Jane Schmitt, *Environmental Consultant Can Save Money*, 16 BUS. FIRST OF BUFFALO 30 (Oct. 18, 1999); Cyndy Day-Wilson, *Environmental Issues in Commercial Leasing Transactions*, 21 SAN DIEGO BUS. J. No. 33, at 25 (2000).

installed a new pump on a known dry hole to defraud buyers.⁵¹ On one hand, conversion to a public system often imposes significant hookup costs (although value is also often increased). On the other hand, cumulative and secondary impacts of utility expansion, such as generally accelerated growth, should also be understood.⁵²

2. Structure

a) *Materials*: Lead in paint and pipes, formaldehyde, radioactive material,⁵³ asbestos, arsenic-treated wood and VOCs are all red flags. Sick-building syndrome has a recognized place in the law of workers' compensation, and public buildings have been abandoned when remediation has failed.⁵⁴ However, renewable materials, green building techniques, LEED, "xeriscapes" (a form of low-plant-density landscaping for dry climates), and the prospect of saving energy and maintenance costs (such as Energy Star)⁵⁵ are all steps in the right direction.

b) *Conditions*: Radon and moisture that can lead to mold are both serious health risks.⁵⁶ Sometimes, indoor air can be worse than a freeway in one's front yard, but the unhealthy air quality from transportation corridors is also well-documented.⁵⁷ Global climate change carries its own penalties in terms of property loss and personal injury, including the recent shift in the United States Department of Agriculture's Growing Zone maps.⁵⁸

⁵¹ N.C. REAL ESTATE COMM'N, BROKER IN CHARGE 58 (citing N.C. GEN. STAT. § 93A-6); see MARC REISNER, *CADILLAC DESERT* (Penguin Books 1986). See also CHARLES FISHMAN, *THE BIG THIRST: THE SECRET LIFE AND TURBULENT FUTURE OF WATER* (Free Press 2011).

⁵² See, e.g., the National Oceanic and Atmospheric Administration discussion on Cumulative and Secondary Impacts of Development in the sensitive coastal zones, coastalmanagement.noaa.gov/impacts.html (last visited Aug. 9, 2012).

⁵³ *Schnell v. Gustafson*, 638 P.2d 850, 852 (Colo. App. 1981) (lack of privity did not insulate seller who did not disclose radioactive mine tailings).

⁵⁴ For example, the New Hanover County Register of Deeds was forced to move probably permanently after years of remediation did not cure the problems in the basement office of the New Hanover County Courthouse. Interviews with county personnel (2011) (on file with authors).

⁵⁵ The home page of the federal program is ENERGY STAR, www.energystar.gov/ (last visited June 26, 2012).

⁵⁶ See *Molds and Moisture*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/mold/ (last visited Apr. 12, 2012).

⁵⁷ As early as 1994, EPA published studies such as the Evaluation of Ecological Impacts from Highway Development. U.S. ENVTL. PROT. AGENCY, *EVALUATION OF ECOLOGICAL IMPACTS FROM HIGHWAY DEVELOPMENT* (1994), available at www.epa.gov/oecaerth/resources/policies/nepa/ecological-impacts-highway-development-pg.pdf.

⁵⁸ See *Climate Change*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/climatechange/effects/health.html (last updated June 14, 2012); See also *USDA Plant Hardiness Zone Maps*, U.S. DEP'T OF AGRIC., planthardiness.ars.usda.gov/PHZMWeb/ (last visited June 27, 2012).

III. AVAILABLE TOOLS

The bottom line is that commentators on all sides of the issue agree that there are ample common law and statutory legal theories throughout the land to entangle all participants in endless and expensive disputes. We start with a cursory review of the liability field, focusing on environmental issues, in order to promote a case for a more straightforward approach. We have all been greatly assisted by the recent extensive works of Professors Robert W. Washburn and F.L. Roberts.⁵⁹ This odyssey will also touch on issues of disclosure regulation, third parties such as consultants and brokers, and the regulatory framework as it affects both the transaction and the licensees.

The traditional legal approach results in a mixed bag of big-ticket liability issues that result in high transactional costs for all involved; the rules are literally and figuratively all over the map. Caveat emptor still applies in some jurisdictions (Massachusetts and New York, for example), but commentators note that courts have tended to treat *residential* real estate transactions more as consumer-protection cases, molding and expanding liability for both sellers and the professionals involved, such as brokers and inspectors.⁶⁰ Even in states that, like North Carolina, permit disclaimers, commentators such as Professor Hetrick argue for greater protection of consumers who rely on professionals to identify important concerns.⁶¹ Additionally, litigation involves complex factual issues that evade summary judgment and increase costs.

Not only have lawsuits by buyers against sellers become more frequent, they have also become more resistant to early dismissal. The relevant determinations are all questions that cannot be disposed of by demurrer, motion to dismiss, or motion for summary judgment. For example, in California, the key factors that create a seller's disclosure duty are his knowledge of the defect and the materiality of the defect. The seller's actual knowledge is a question of fact for the jury, as is the

⁵⁹ See Washburn, *supra* note 10, at 381; Roberts, *supra* note 20, at 1 (for excellent summaries of the trends).

⁶⁰ Marc E. Gold, *Updated Strategies for Minimizing Environmental Liabilities in Real Estate Transactions*, 20 PRAC. REAL EST. LAW. 45 (2004). See *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985) (referring to *Banks v. Salina*, 413 So. 2d 851, 852 (Fla. 4th Dist. Ct. App. 1982), a case in which the Fourth District Court of Appeal of Florida held for the buyer where the seller did not disclose known defects in the roof, noting the trend toward consumer protection (*Id.* at 849) and criticizing another decision that held there was no duty to disclose even known defects as "offensive"); see also Washburn, *supra* note 10 at 381 (arguing for expanding protection); Roberts, *supra* note 27, at 3-4, 13 (arguing that sellers and brokers ought to be able to bargain away liability more easily through disclaimers and "as is" clauses).

⁶¹ PATRICK K. HETRICK ET AL., *WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA* §§ 9-13 (6th ed. 2011).

question of materiality. The suit must, therefore, proceed to trial if these issues are raised in the pleadings and cannot be resolved by a motion for summary judgment.⁶²

A. SELLER LIABILITY

1. *Common Law*: Affirmative misrepresentation and fraudulent concealment are actionable, even if difficult to prove.

a) *Fraud and Misrepresentation*: Environmental cases are guided by traditional causes of action under the Second Restatement of Torts. The sticking points are usually (1) materiality, (2) scienter (knowledge and intent) and (3) justifiable reliance.⁶³ “[T]he classic common law tort remedies [rescission, and actual and exemplary damages, are available] for damages caused by intentional misrepresentation, negligent[t] misrepresentation, or fraudulent concealment.”⁶⁴ As Roberts notes, “In some jurisdictions, the measure of damages is either the difference between the value of the property as it was represented to be and its actual value at the time of purchase (known as the “benefit of the bargain” rule) or the cost of repair or replacement. In others, it is “the difference between the actual value of that with which the defrauded person parted and the actual value of that which [the defrauded person] received.”⁶⁵

1) *Garden-Variety Fraud*: Examples of environmental issues include the following:

a. *Onsite*: Physical environmental measures such as acreage,⁶⁶ square footage,⁶⁷ water sources⁶⁸ and drainage.⁶⁹

⁶² Roberts, *supra* note 20, at 19-20 (footnotes omitted).

⁶³ The elements of intentional misrepresentation are (1) a false representation of fact, (2) knowledge by the defendant that the representation is false (or reckless disregard for the truth or falsity of the statement), (3) intent to induce the plaintiff to rely on the information, (4) justifiable reliance upon the representation by the plaintiff, and (5) damage to the plaintiff resulting from the reliance on the representation. RESTATEMENT (SECOND) OF TORTS § 525 (1989); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984). *See, e.g.*, Stewart v. Thrasher, 610 N.E.2d 799, 803 (Ill. App. Ct. 1993) (applying elements of intentional misrepresentation to areas of recent real estate sales). Washburn, *supra* note 10, at 12; 37 AM. JUR 2D *Fraud & Deceit* § 163-164; Leo Bearman, Jr., *Caveat Emptor in Sales of Realty--Recent Assaults upon the Rule*, 13 VAND. L. REV. 541, 561 (1961); Roberts, *supra* note 20, at 1-4; Hetrick, *supra* note 61, §§ 9-13.

⁶⁴ Washburn, *supra* note 10, at 385-86 (“These remedies are clearly applicable to real estate sales and other transactions, and they are inherently capable of evolving to accommodate the changing circumstances of the relevant marketplace.”).

⁶⁵ Roberts, *supra* note 20, at 12-13.

⁶⁶ Hetrick, *supra* note 61, §§ 9-13; Norburn v. Mackie, 136 S.E.2d 279, 281-84 (N.C. 1964).

⁶⁷ Compare Marshall v. Keaveny, 248 S.E.2d 50 (N.C. Ct. App. 1978) (no reasonable reliance on seller’s representations as to square footage), with John v. Robbins, 764 F. Supp. 379 (M.D.N.C. 1991) (lay plaintiffs entitled to rely on representations of professionals). *See also* 37 AM.

b. *Offsite*: This category seems mainly to involve uses that affect the subject property, from parking and air-pollution issues to hog farms and seasonal conditions. An interesting Florida case involved a claim that a developer knew that an adjoining parcel would be used as a school, but misrepresented to prospective purchasers that the land would be a “natural preserve.”⁷⁰ The court rejected defense arguments that since the school plan was part of the public record, the buyers had not exercised reasonable diligence, opting instead for a “case-by-case” factual determination.⁷¹

2) *Concealment*: As with most white-collar crime, examples of fraudulent concealment vary from the sophisticated to the simple. In *Herzog v. Capital Co.*, the seller plastered and painted over water damage to the premises.⁷² In *Kramer v. Musser*, the seller merely placed a mattress over a hole where dry rot and termites could be seen.⁷³ If a seller actively conceals defects in the condition of his property in order to prevent the buyer from discovering them, courts treat this as though the seller had made an actual affirmative misrepresentation on the subject. Accordingly, a seller cannot hide behind an “as is” clause or an inspection addendum in the case of either fraudulent misrepresentation or active fraudulent concealment.⁷⁴

In the North Carolina Real Estate Commission example cited earlier, the seller-broker not only concealed the complete well tests; she (1) placed a new pump on a dry well, clearly to convey the impression that the well was functional, and (2) when confronted, she apparently knew the reason for the well’s lack of water but attributed it to recent dry

JUR. 2D, *supra* note 63, §§ 163-164.

⁶⁸ *Fisher v. Brotherton*, 255 P. 854 (Cal. Dist. Ct. App. 1927); *Gronlund v. Anderson*, 227 P.2d 741 (Wash. 1951). *See also* *Azam v. M/I Schottenstein Homes*, 761 So. 2d 1195 (Fla. 4th Dist. Ct. App. 2000); *Little v. Stogner*, 592 S.E.2d 5 (N.C. Ct. App. 2004); *Hetrick*, *supra* note 61, §§ 9-14, at 136-37.

⁶⁹ *Rowell v. Jaris*, 93 A.2d 485 (Me. 1952); 37 AM. JUR. 2D, *supra* note 63, § 167.

⁷⁰ *Azam v. M/I Schottenstein Homes*, 761 So. 2d 1195 (Fla. 4th Dist. Ct. App. 2000).

⁷¹ *Id.* *See also* *Little v. Stogner*, 592 S.E. 2d 5 (N.C. Ct. App. 2004); *Hetrick*, *supra* note 70, §§ 9-14, at 136-37.

⁷² *Herzog v. Capital Co.*, 164 P.2d 8, 9 (Cal. 1942).

⁷³ *Kramer v. Musser*, 136 P.2d 74, 75 (Cal. Dist. Ct. App. 1943).

⁷⁴ *Roberts*, *supra* note 20, at p. 23; *Washburn*, *supra* note 10, at 385-86 n.36 (“In order to prove that the concealment amounted to fraudulent misrepresentation, the plaintiff must prove (1) the concealment of a material fact; (2) the concealment was intended to induce a false belief under the circumstances creating a duty to speak; (3) the innocent party could not have discovered the truth through a reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and relied upon the silence as a representation that the fact did not exist; (4) the concealed information was such that the injured party would have acted differently had he been aware of it; and (5) that reliance by the person from whom the fact was concealed led to his injury.”).

weather.⁷⁵

3) *Non-Disclosure*: Non-disclosure without necessarily harboring fraudulent intent is more prevalent and problematic. The rule of caveat emptor, as in products liability, began to seem harsh and “unappetizing” when applied to the average homebuyer who was often unaware of the issues.⁷⁶ Courts began to chip away at the concept, finding that, despite no blanket duty to speak, responses to direct inquiries had to be truthful, and that partial disclosure, or half-truths, could be actionable.⁷⁷

Therefore, if the seller is asked about or speaks about a particular subject, he or she must make a full and fair disclosure as to that subject so as not to mislead the buyer. Also rather well established is the obligation of complete disclosure based on a finding of an agency, fiduciary, confidential, or other relationship of trust existing legally or factually between the parties. A majority of state courts have expanded the scope of the duty of a seller of residential real property to disclose material facts to a prospective buyer.⁷⁸

A frequently cited California appellate case, *Lingsch v. Savage*, recited the general rule and also held that privity and fiduciary duty were no longer relevant in an action for fraud based on non-disclosure.⁷⁹ Now, to prove fraud, the following five elements must be shown: (1) non-disclosure by the defendant of facts that materially affected the value of the property in question; (2) knowledge by the defendant both of the facts and that those facts were either unknown to or difficult for the plaintiff to ascertain (latency); (3) the intention of the defendant to induce action by the plaintiff (not fraudulent intent per se); (4) justifiable reliance by the plaintiff; and (5) resulting damages.⁸⁰ As Roberts notes, some courts require disclosure of latent defects known to the seller only if the condition is dangerous.⁸¹

⁷⁵ N.C. REAL ESTATE COMM’N, *supra* note 59, at 58 (citing N.C. GEN. STAT. § 93A-6 (2010-2011)).

⁷⁶ *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985) (citing *Banks v. Salina*, 413 So. 2d 851, 852 (Fla. 4th Dist. Ct. App. 1982)).

⁷⁷ RESTATEMENT (SECOND) OF TORTS § 209 (1989); Washburn, *supra* note 10, at 387, 393; 37 AM. JUR 2D, *supra* note 10, §§ 167, 200-209.

⁷⁸ Washburn, *supra* note 10, at 387. *Accord* *Weintraub v. Krobatsch*, 317 A.2d 68, 75 (N.J. 1974); Indiana, Alabama, and Minnesota also impose no duty to disclose. Roberts, *supra* note 20, at 13-14.

⁷⁹ *Lingsch v. Savage*, 29 Cal. Rptr. 201, 204-06 (Ct. App. 1963).

⁸⁰ The general rule and its elements may be found in RESTATEMENT (SECOND) OF TORTS § 525 (1989). North Carolina imposes a higher duty on buyers. *Hetrick*, *supra* note 61, §§ 9-14. *See* Roberts, *supra* note 20, at 10-13.

⁸¹ Washburn, *supra* note 10, at 387, 390-91.

4) *Negligent Misrepresentation*: The conventional rule is that there is no liability for negligent misrepresentation. The California case of *Easton v. Strassburger* expanded the boundaries by imposing upon both sellers and agents a duty to discover material issues, creating a cause of action for negligently misrepresenting issues they had a duty to investigate.⁸² However, this is not the law in most jurisdictions. Licensees, however, may be subject to the duty pursuant to statute or regulation. As Washburn notes,

A limited number of courts have gone so far as to find an innocent misrepresentation actionable In a case where the transaction depended on the property being issued a permit for a septic tank, the Washington Court of Appeals found that: When a seller, even though she acts under an honest mistake without any intent to deceive, misrepresents either the quantity or quality of the land sold, a buyer who justifiably relies on this misrepresentation is entitled to the difference between the market value of the land had it been as represented and the market value of the property as it actually was at the time of the sale.⁸³

Thus, the court employed the fraud measure of damages. Even Professor Washburn, who generally argues for greater consumer protection, is troubled by a broad expansion of the concept:

A finding that innocent silence is actionable, however, would inappropriately expand the innocent misrepresentation doctrine; purchaser's reliance on seller's failure to disclose when the seller does not know of the defect or condition cannot form the basis of liability. It is to be expected therefore, despite the treatment of non-disclosure as misrepresentation in other regards, that non-disclosure where there is a duty to disclose is actionable only if the "silence is accompanied by deceptive conduct or suppression of material facts results in active concealment."⁸⁴

5) *Key Issues*

a. *Duty*: Is there a duty (either to investigate (*Easton*⁸⁵)) or to disclose) because there was a direct inquiry?

⁸² *Easton v. Strassburger*, 199 Cal. Rptr. 383, 391 (Ct. App. 1984). The seller remains jointly and severally liable even if the broker has the largest share of comparative fault. *Id.* at 396-97.

⁸³ Washburn, *supra* note 10, at 391-392.

⁸⁴ *Id.* at 392 (footnotes omitted) (arguing for expanded protection); Roberts, *supra* note 20, at 3-4, 13 (arguing that sellers and brokers ought to be able to bargain away liability more easily through disclaimers and "as is" clauses).

⁸⁵ *Easton v. Strassburger*, 199 Cal. Rptr. at 391.

b. *Materiality*: Materiality seems to be one of those legal principles most like the golden rule: do unto buyers as you would have them do unto you.⁸⁶ On the pragmatic side of the ledger, of course, materiality is an issue of fact that eludes summary judgment.⁸⁷ Actions for non-disclosure generally turn on the innate objective value of the information.⁸⁸ A party can also create both a material issue and a duty of disclosure by inquiring about an issue. The big unknown is whether the jurisdiction requires a truthful response. Examples of environmental issues held to be material include the following:

(1) *Onsite*: (1) fill;⁸⁹ (2) proximity of landfill: toxic waste site;⁹⁰ (3) flooding;⁹¹ (4) water supply;⁹² (5) water quality;⁹³ (6) water rights;⁹⁴ (7) wetlands;⁹⁵ (8) pests and pest damage;⁹⁶ (9) stability and foundation;⁹⁷ (10) toxics;⁹⁸ (11) waste disposal; (12) defective septic system;⁹⁹ (13) sewer connection charges;¹⁰⁰ (14) radioactive mine tailings;¹⁰¹ (15) urea-formaldehyde insulation;¹⁰² (16) synthetic

⁸⁶ Or the upgraded version we proposed: “Do unto others as you would have them do to your Children and Grandchildren,” Cutting, *supra* note 37, at 883. See RESTATEMENT (SECOND) OF TORTS § 538 (1989).

⁸⁷ Roberts, *supra* note 20, at 19-20.

⁸⁸ *Id.* at 10-11.

⁸⁹ Oakes v. McCarthy Co., 73 Cal. Rptr 127 (Ct. App. 1968); Horne v. Cloninger, 123 S.E. 2d 112 (N.C. 1961); W.M. Moldoff, Annotation, *Liability of Vendor of Structure for Failure to Disclose that It Was Built on Filled Ground*, 80 A.L.R. 2d 1453 (1961); Easton v. Strassburger, 199 Cal. Rptr. 383, 391 (Ct. App. 1984); Cohen v. Vivian, 349 P.2d366 (Colo. 1960); Loghry v. Capel, 132 NW.2d 417, 419 (Iowa 1965); Carver v. Roberts, 337 S.E.2d 126, 128 (N.C. Ct. App. 1985).

⁹⁰ Strawn v. Canuso, 657 A.2d 420, 423 (N.J. 1995) (ruling limited to builder-sellers because of superior knowledge and access to information). Not sufficient: London v. Courduff, 534 N.E.2d 332 (N.Y. 1988).

⁹¹ Washburn, *supra* note 10, at 390 (citing Ware v. Scott, 257 S.E.2d 855, 858 (Va. 1979)).

⁹² *Id.* (citing Janinda v. Lanning, 390 P.2d 826, 829 (Idaho 1964)).

⁹³ U.S. ENVTL. PROT. AGENCY, *supra* note 6; Leggett & Bockstael, *supra* note 6, at 121-44; Banicki, *supra* note 6; Poor et al., *supra* note 6, at 797-806; Streiner & Loomis, *supra* note 6; AUSTIN ET AL., *supra* note 6; PHILA. WATER DEP'T, *supra* note 6.

⁹⁴ Washburn, *supra* note 10, at 390 (citing Russ v. Brown, 529 P.2d 765, 769-70 (Idaho 1974)).

⁹⁵ Smalls v. Blueprint Dev. Inc., 497 S.E.2d 54, 56 (Ga. Ct. App. 1998).

⁹⁶ Godfrey v. Steinpress, 180 Cal. Rptr. 95, 99 (Ct. App. 1982); Mulkey v. Waggoner, 338 S.E.2d 755, 756-57 (Ga. Ct. App. 1985).

⁹⁷ Thacker v. Tyree, 297 S.E.2d 885, 886 (W. Va. 1982).

⁹⁸ Schnell v. Gustafson, 638 852 (Colo. App. 1981); Washburn, *supra* note 10, at 389.

⁹⁹ Washburn, *supra* note 10, at 389; Catucci v. Ouellette, 592 2d 962, 963-64 (Conn. App. Ct. 1991); Wilhite v. Mays 232 S.E.2d. 121,143 (Ga. 1977); Andreychak v. Lent, 607 A.2d 1346, 1348 (N.J. Super. Ct. App. Div. 1992); Anderson v. Harper, 622 A.2d 319, 323-24 (Pa. Super. Ct.), *appeal denied*, 634 A.2d 222 (Pa. 1993).

¹⁰⁰ Washburn, *supra* note 10, at 381, 390.

¹⁰¹ *Id.* at 389-90.

¹⁰² *Id.* at 389-90.

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stucco;¹⁰³ and (17) energy consumption. One commentator contends that energy consumption is a measurable part of value and is therefore a material issue.¹⁰⁴

(2) *Offsite*:¹⁰⁵ *Neighborhood Nuisance*:¹⁰⁶ Not all cases involve the classic rendering plant. In one New Jersey instance, tennis courts that spoiled the view were held to be a nuisance.¹⁰⁷ In a twist, closure of a nearby beach for swimming, which most would likely consider very important, was held not actionable in New Jersey.¹⁰⁸ The bulk of concerns in this category seem to involve conditions that may be intermittent, such as noises and odors, as well invisible pollution in the area in some media (current, planned or historic). Landfills, industrial facilities, intensive livestock, and even athletic facilities can all constitute major impediments to siting. Impressions and image have an impact, so even ghosts and the possibility of crime may be significant, especially if it would affect value locally (and even in caveat emptor New York, where the seller created the condition).¹⁰⁹

c. *Did Plaintiff Justifiably Rely?* Another key issue is whether the plaintiff made a sufficiently diligent inquiry. Contrast the North Carolina rule, which places a heavy burden on the buyer,¹¹⁰ with the California common law rule, which places a duty on the seller and brokers.¹¹¹ But even when the facts are on the public record, courts may not expect ordinary buyers to discover them.¹¹² Not surprisingly, when a

¹⁰³ N.C. ASS'N OF REALTORS®, *Synthetic Stucco: The Straight Facts*, available at images.kw.com/docs/0/0/3/003678/1266263834122_stucco.pdf (last visited July 10, 2012).

¹⁰⁴ Andrea M. Guttridge, *Redefining Residential Real Estate Disclosure: Why Energy Consumption Should Be Disclosed Prior to the Sale of Residential Real Property*, 37 RUTGERS L. REC. 164 (2010).

¹⁰⁵ Roberts, *supra* note 20, at 9; Colin Campbell, Annotation, *Liability of Vendor or Real Estate Broker for Failure to Disclose Information Concerning Off-Site Conditions Affecting Value of Property*, 41 A.L.R. 5TH 157 (1996).

¹⁰⁶ Noise and disturbances: CAL. CIV. CODE § 1102.6 (Westlaw 2012); Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101, 103-04 (Ct. App. 1998); Alexander v. McKnight, 9 Cal. Rptr. 2d 453, 455 (Ct. App. 1992).

¹⁰⁷ Tobin v. Paparone Constr. Co., 349 A.2d 574, 580 (N.J. Super. Ct. Law Div. 1975).

¹⁰⁸ Capano v. Stone Harbor, 530 F. Supp. 1254, 1263 (D.N.J. 1982).

¹⁰⁹ Stambovsky v. Ackley, 572 N.Y.S.2d 672, 675 (N.Y. App. Div. 1991). See Ronald Benton Brown & Thomas H. Thurlow III, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose that Properties Are Psychologically Tainted*, 49 OKLA. L. REV. 625, 626-28 (1996). See also CAL. CIV. CODE § 1710.2 (Westlaw 2012).

¹¹⁰ Hetrick, *supra* note 61, at 136.

¹¹¹ Easton v. Strassburger, 199 Cal. Rptr. 383, 391 (Ct. App. 1984). North Carolina administratively imposes duties on brokers. N.C. GEN. STAT. ANN. § 93A-6(a)(1) (Westlaw 2012). See N.C. REAL ESTATE COMM'N, LICENSE LAW RULES AND COMMENTS 4-7, available at www.ncrec.state.nc.us/pdf/licensingbooklet/studyguide.pdf (last visited July, 10 2012).

¹¹² Azam v. M/I Schottenstein Homes, 761 So.2d 1195 (Fla. 4th Dist. Ct. App. 2000). See also Little v. Stogner, 592 S.E.2d 5 (N.C. Ct. App. 2004) (buyers thought that the property was

seller uses an “artifice” to dissuade a buyer from inquiry (essentially concealment) courts find the buyer’s reliance to be justified.¹¹³ Inspections factor into this equation. Professor Washburn notes that an investigation is necessary for both value and protection, given that even states that require seller disclosure cannot guarantee that all relevant information will be provided.¹¹⁴ A standard home inspection seems to be the bare minimum, but when must a party add radon, lead, asbestos, well or other tests? Here again, parties, especially out-of-area parties, frequently rely on brokers to advise them. Is it realistic to expect the average buyer to investigate, even with a checklist? Does it make sense to compel all buyers to do so when the seller has only one property to be concerned about and usually has better access to information?

b) *Implied Warranty*: A New Jersey appellate court has permitted a buyer to recover against the seller of an existing home with a defective septic system on the basis that “an implied warranty of habitability should also apply to such a sale,” employing the venerated rationale of “current notions of what is right and just.”¹¹⁵ However, this raises issues of “habitability” in the residential rental context.

2. Statutory Liability

a) *Unfair or Deceptive Trade Practices*: In some jurisdictions, statutory liability exists under the consumer protection statutes and “Little Federal Trade Commission” Acts,¹¹⁶ although in California, private actions for damages are not permitted.¹¹⁷ The FTC is reportedly preparing to breathe new life into Section 5 of the FTC Act.¹¹⁸

adjacent to a nature preserve when it was actually adjacent to a planned school); Hetrick, *supra* note 61, §§ 9-13. In the commercial context, Judge Herbert E. Phipps notes that failing to read even an admittedly faulty environmental report can constitute contributory negligence, closely related to justifiable reliance, in our view. *Failing to Read Faulty Environmental Report Costs Landowner*, 16 REAL ESTATE/ENVIRONMENTAL LIABILITY NEWS, No. 5 (Dec. 17, 2004).

¹¹³ Little v. Stogner, 592 S.E.2d 5 (N.C. Ct. App. 2004).

¹¹⁴ Washburn, *supra* note 10, at 404-407.

¹¹⁵ Andreychak v. Lent, 607 A.2d 1346, 1348 (N.J. Super. Ct. App. Div. 1992).

¹¹⁶ State statutes can be traps for the unwary, since the damages can be substantial. Christine Lipsley & Dylan Tuggle, *Little FTC Acts and Statutory Treble Damages—Traps for the Unwary*, AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, available at apps.americanbar.org/litigation/committees/businessstorts/articles/1109_lipse.html (last visited Aug. 4, 2012).

¹¹⁷ One author (joined in this opinion by the co-authors) was a chair of the California District Attorneys Association Consumer Protection Council who believes that the statutes can only be effective if enforced by both regulators and private litigation for those adversely affected. See James Wheaton, *California’s Unfair Competition Law: The Biggest Hammer in the Tool Box*, 9 ENVTL. L. NEWS (2000). See also CAL. BUS. & PROF. CODE § 17200 et seq. (Westlaw 2012); Chern v. Bank of Am., 544 P.2d 1310, 1315–16 (Cal. 1976) (private plaintiffs can secure injunctive relief but not damages; decided before statute was amended to eliminate private actions).

¹¹⁸ Interviews with J. Thomas Greene, Special Counsel, Fed. Trade Comm’n. (May 2011, Feb. 2012) (on file with authors).

b) *Disclosure Legislation: Sword or Shield?*: Disclosure statutes are believed by many to be useful, but they are often perfunctory, incomplete and frequently contentious.¹¹⁹ Statutes may shift liabilities among sellers, brokers and buyers.¹²⁰ Few state courts followed the teachings of *Easton v. Strassburger*.¹²¹ A minority opted for legislative disclosure provisions.¹²² The question is whether the statute at issue is intended to limit liability or to expand it, and that presumes knowledge of the underlying common law, which is often on-hand for the common populous.

In July of 1985 the California legislature enacted the first statute requiring sellers of residential real property, and participating brokers, to disclose to prospective purchasers comprehensive information relative to the condition, value and desirability of the property offered for sale. Within a few years thereafter, sixteen other states passed legislation mandating a more limited form of disclosure by sellers, but not by brokers. Presently, many of the remaining thirty three states appear to be considering the more limited yet prevailing form of mandatory property condition disclosure legislation. The California legislation essentially codified the state's unique common law requirement that both sellers and brokers discover and disclose all information material to the value and desirability of the property offered for sale. *Where it has been enacted, however, the prevailing form of limited disclosure legislation has frozen the local common law at a stage of development primitive by California standards.*¹²³

1) *Types*: These statutes have taken several basic forms. The remaining states have either no statutes or a patchwork of disclosure requirements.¹²⁴

a. *California's Disclosure Statutes*: The California statute itself actually limits *Easton* liability, as noted by Washburn.¹²⁵ The statute was sponsored by the California Association of REALTORS® specifically in

¹¹⁹ Roberts, *supra* note 20, at 44.

¹²⁰ See generally Hetrick, *supra* note 61, §§ 9-11.4 to 9-11.5(g); Washburn, *supra* note 10. See also Gary S. Moore & Gerald Smolen, *Real Estate Disclosure Forms and Information Transfer*, 28 REAL EST. L. 319 (2000) (discussing information that materially affects value).

¹²¹ *Easton v. Strassburger*, 199 Cal. Rptr. 383, 391 (Ct. App. 1984). See discussion in Washburn, *supra* note 10, at 408-15.

¹²² Washburn, *supra* note 10, at 436-37.

¹²³ Washburn, *supra* note 10, at 381 (emphasis added) (footnotes omitted). See also Roberts, *supra* note 20, at 20-21 (North Carolina, Tennessee, Oregon, Maryland and Virginia "disclaimer statutes").

¹²⁴ Washburn, *supra* note 10, at 407-15.

¹²⁵ *Id.* at 409-15.

response to *Easton*.¹²⁶ The disclosure requirements are not as extensive as *Easton* appears to require, nor are they exclusive.¹²⁷ The statute does, however, limit liability to culpable conduct, limits exposure for inaccessible areas, and provides a “due diligence” defense that requires buyers to use reasonable care.¹²⁸ The California statutes mandate disclosure of certain environmental issues unless a consumer information booklet on common environmental issues is delivered (although this requirement does not purport to be exclusive).¹²⁹

b. *Maine’s “Administrative Duties”*: This class of statute imposes some liability on the broker through professional licensing laws. North Carolina’s Real Estate Licensing Law has similar provisions (“duty to disclose to each prospective buyer any material fact regarding a listing property about which the agent is aware *or should reasonably be aware*, even if the seller chooses not to disclose”).¹³⁰

c. *Prevailing Disclosure Act*: These statutes impose varying disclosure requirements on the seller but not the broker, and they may or may not include statutory remedies.¹³¹

d. *Specialized Disclosures*: There are also overlapping layers, such as the familiar federal lead paint addenda,¹³² as well as specialized statutes, such as the North Carolina’s toxics disclosures and California’s

¹²⁶ CAL. CIV. CODE § 2079.12(b) (Westlaw 2012). The statute includes a statement of purpose:

It is the intent of the Legislature to codify and make precise the holding of *Easton v. Strassburger*, 152 Cal.App.3d 90.” *Id.* “The Legislature hereby finds . . . [t]hat the imprecision of terms in the opinion rendered in *Easton v. Strassburger*, 152 Cal.App.3d 90, and the absence of a comprehensive declaration of duties, standards, and exceptions, has caused insurers to modify professional liability coverage of real estate licensees and has caused confusion among real estate licensees as to the manner of performing the duty ascribed to them by the court . . . That it is necessary to resolve and make precise these issues in an expeditious manner . . . That it is desirable to facilitate the issuance of professional liability insurance as a resource for aggrieved members of the public . . . That Sections 2079 to 2079.6, inclusive, of this article should be construed as a definition of the duty of care found to exist by the holding of *Easton v. Strassburger*, 152 Cal.App.3d 90, and the manner of its discharge . . . *Id.* at § 2079.12(a).

¹²⁷ CAL. CIV. CODE §§ 2079-2079.14 (Westlaw 2012) (especially § 2079.7). *See* CAL. DEP’T OF REAL ESTATE, DISCLOSURES IN REAL PROPERTY TRANSACTIONS (6th ed. 2005), available at www.dre.ca.gov/pub_disclosures.html#_Toc122939761.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ N.C. GEN. STAT. ANN. § 93A-6(a)(1) (Westlaw 2012) (emphasis added). *See* Hetrick, *supra* note 61 §§ 9-11.5(g).

¹³¹ Washburn, *supra* note 10, at 416-17, 428-37.

¹³² *Lead*, *supra* note 19; U.S. DEP’T OF HOUS. & URBAN DEV, *The Lead Disclosure Rule*, portal.hud.gov/hudportal/HUD?src=/program_offices/healthy_homes/enforcement/disclosure (last visited July 21, 2012) (buying and renting).

environmental hazards legislation.¹³³

e. *Disclaimer Statutes*: Some states have opted to permit disclaimers instead of disclosure.¹³⁴ The statutes displace disclosure with disclaimer.

f. *Inspection Statutes*: Related statutes require inspection of properties. Professor Washburn recommends a requirement for a professional inspection.¹³⁵ While we agree that inspections should be obtained in most cases, we do not expect that states will impose the obligation.

2) *The Impacts*: Commentators are split on the disclosure statutes. Some contend they are ineffective, while others argue that important information can adequately be conveyed even to unsophisticated buyers.¹³⁶ We argue that parties can be educated as to many things, but that current efforts fall short because the forms are incomplete, confusing and overly legalistic. Professor Washburn argues that the evolution of the common law, as it was starting to unfold in California, would be preferable.¹³⁷ The disclosure statutes themselves tend to limit required disclosure, insulate brokers from responsibility, and even immunize sellers if disclosure is made.¹³⁸ Commentators such as Roberts argue cogently that common law that expands statutory requirements can create uncertainty for all, because the two sources of law will continue to unfold concurrently without much clarity for the

¹³³ N.C. REAL ESTATE COMM'N, *supra* note 51; CAL. CIV. CODE §§ 2079-2079.14, *supra* note 127.. See CAL. DEP'T OF REAL ESTATE, *supra* note 127. See also N.J. STAT. ANN. § 13:1K-6 (Westlaw 2012); Anne Andrew et al., *Seller Beware: The Indiana Responsible Property Transfer Law*, 24 IND. L. REV. 761 (1991); Judith G. Tracy, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 STAN. ENVTL. L.J. 169 (1991) (discussing existing federal and state disclosure requirements as well as proposed legislation to require more extensive disclosure).

¹³⁴ Washburn, *supra* note 10. See also Roberts, *supra* note 20, at 20-21 (discussing North Carolina, Tennessee, Oregon, Maryland and Virginia "disclaimer statutes").

¹³⁵ Washburn, *supra* note 10, at 438-46.

¹³⁶ See also Mark Stephan, *Environmental Information Disclosure Programs: They Work, But Why?*, 83 SOC. SCI. Q. 190-205 (2002); Katherine A. Pancak et al., *Residential Disclosure Laws: Demise of Caveat Emptor*, 24 REAL EST. L.J. 291 (1996); Karen Eilers Lahey & D.A. Riddle, *The Ohio Experience: The Effectiveness of Mandatory Real Estate Disclosure Forms*, 25 REAL EST. L.J. 319 (1997); Debra Peterson Conrad, *Truth or Consequences? Residential Seller Disclosure Law*, 65 WIS. L. REV. 9 (1992).

¹³⁷ Washburn, *supra* note 10, at 382-83 ("[T]he growth of legislation in this area has arrested the development of the common law. This is true because these statutes and regulations generally do not require as much disclosure as the common law required, and because most of the legislative disclosure burden is placed on the seller rather than on the real estate broker. The National Association of REALTORS® (NAR) has been active in promoting the enactment of the prevailing (non-California) form of legislation. Clearly, the NAR is attempting to protect its membership from the common law development of broker inspection/disclosure duties by promoting legislation which places more of the burden on the seller.").

¹³⁸ *Id.*

consumer or the practitioner.¹³⁹

That discussion leads directly to the question of the adequacy of required disclosure. Much of it is perfunctory, as it is in North Carolina, where all environmental issues are lumped into one or two questions. That can make the inevitable jargon even less understandable. The real question should be whether the selected method adequately alerts even an average consumer to environmental issues that can affect a family's health and wallet. While commentators may be split on the subject of disclosure, the housing and brokerage sectors consistently—and often successfully—oppose any expansion of required disclosure (even of beach and inlet hazards) unless it limits liability.¹⁴⁰ An unintended effect of the Prevailing Disclosure Statutes is that,

As a practical matter, the buyer must undertake the same inspection of the premises as was necessary in the absence of the Prevailing Disclosure Act to protect against overpaying and to establish the element of reasonable reliance for a possible fraud claim. An unfortunate effect [sic] of the statute is that upon receiving a disclosure document with a formal and legalistic appearance, the buyer may assume that he or she is fully informed and forego such an investigation.¹⁴¹

3) *Contractual Risk Shifting (“As Is” and “Merger” clauses)*: Parties and real estate practitioners are naturally interested in risk shifting, but what varieties of the usual devices are actually efficacious in a given jurisdiction? The questions are twofold: First, can parties agree to shift risks, especially for unknown environmental issues? Secondly, are the devices in use, such as standard state-approved disclosure forms, actually sufficient to communicate those risks to the parties? An “As Is” clause typically cannot save one from actual misrepresentation, including active concealment of known issues (thus the concern about latent defects, which is discussed below).¹⁴²

¹³⁹ Roberts, *supra* note 20, at 16-17 (“Generally speaking, the disclosure statutes supplement, but do not supersede, the common law disclosure duties. For example, in California, the statutory disclosure statement does not relieve the seller of the common law duty of disclosure if the common law duty is beyond the matter specified in the statutory form. Conversely, the specific disclosure requirements of the statute can go beyond the common law duty. Therefore, in California, the statutory and common law disclosure duties run concurrently, but they are not identical. It seems clear that the legislature has not simply rubber-stamped the common law.”).

¹⁴⁰ N.C. ASS’N OF REALTORS®, 2009 LEGISLATIVE SESSION SUMMARY 5-6, available at www.siorcarolinas.com/assets/documents/Legislative%20Update%20for%202009.pdf.

¹⁴¹ Washburn, *supra* note 10, at 435 (footnote omitted).

¹⁴² See, e.g., cases collected in Roberts, *supra* note 20, at 19-24 (dating back nearly to the “Wild West” in California and representations that property was free of alkali, e.g., *Palladine v. Imperial Valley Farm Lands Ass’n*, 225 P. 291, 299 (Cal. Dist. Ct. App. 1924)).

A few states, including North Carolina, permit sellers to employ statutory disclaimers that insulate the seller (but not necessarily the broker) from disclosure of facts typically required to be disclosed.¹⁴³ Other states refuse to enforce “As Is” clauses on a variety of essentially public policy bases, notably where the defect is latent.¹⁴⁴ States also engage in the remaining non-disclosure cases in a more complex process that spices the waters. Inquiry into who has the duty to speak often turns on those venerated concepts of latency and patency that complicate the cases. These factual issues defy summary judgment while introducing legal concepts that are difficult to predict. Integration clauses are similarly contentious when used to limit liability for fraud and non-disclosure.¹⁴⁵

Professor Roberts argues that more flexibility to use contractual defenses such as the “As Is” and “Merger” or “Integration” clauses ought to be included in the marketplace to allow risk shifting.¹⁴⁶ If so, the common law will presumably expand, as Professor Washburn urges, given that actual fraud claims require court interpretation. This is a dilemma for honest sellers and brokers because of the costs of defense.¹⁴⁷

¹⁴³ Virginia, Tennessee, Oregon and Maryland are recent examples. *See, e.g.*, N.C. GEN. STAT. ANN. § 47E-4(c) (Westlaw 2012). *See also* Hetrick, *supra* note 61, §§ 9-11.5(d); Roberts, *supra* note 20, at 32-33.

¹⁴⁴ *See, e.g.*, Roberts, *supra* note 20, at 35-36 (citing, among many others from numerous jurisdictions, *Lingsch v. Savage*, 29 Cal. Rptr. 201, 206 (Ct. App. 1963)).

¹⁴⁵ Roberts, *supra* note 20, at 35-36 (“As with cases of active misrepresentation, many jurisdictions also hold that integration clauses will not bar lawsuits based on non-disclosure of material facts. These jurisdictions reason that because failure to disclose a defect is equivalent to fraud, and as integration clauses do not protect a party from his own fraud, they should similarly not relieve the seller of a duty to make the required disclosures . . . Even an express disclaimer will not insulate a seller from liability for required disclosures. In *Katz v. Department of Real Estate*, a seller/broker expressly disclaimed any warranties as to compliance with municipal or zoning regulations. It turned out that the property violated several building code provisions for which the city had issued an ‘Order to Comply.’ The broker argued that his failure to disclose was immaterial in light of his express disclaimers. The court disagreed and found that the disclaimer clause was no more effective than an ‘as is’ clause. In other words, the disclaimer clause would not absolve the seller from passive concealment of conditions not readily apparent to the buyer.” In North Carolina, a merger clause is ineffective “where enforcement of the merger clause . . . would frustrate and distort the parties’ true intentions and understanding regarding the contract.”); *see* Hetrick, *supra* note 61, §§ 9-15.

¹⁴⁶ Roberts, *supra* note 20, at 39-47, 53.

¹⁴⁷ *Id.* at 32. (“A seller cannot protect himself from allegations of fraudulent misrepresentation by the inclusion of either an ‘as is’ clause or an integration clause in the contract. This result has the effect of preventing an innocent seller who has made no fraudulent misrepresentations or concealments from obtaining contractual protection against lawsuits by a buyer alleging that misrepresentations were made. Of course, this rule that ‘as is’ clauses are ineffective against positive fraud does not hurt the seller if he has made no affirmative misrepresentations, and the buyer does not allege that he did. However, most buyers’ lawyers know enough to insert a fraud cause of action in every complaint. Thus, a litigation averse or risk averse seller who bargains for an ‘as is’ clause can obtain little protection from a suit by the buyer. Since the existence of fraud is a question of fact,

B. BROKERS

While most sellers are uninsured for the torts just discussed, brokers carry substantial coverage and are therefore increasingly the targets of claims. Negligence, breach of fiduciary duty, unfair competition, and breach of statutory obligations can form the basis for both civil and even criminal liability, as well as for actions under licensing laws.

1. *Regulator-Imposed Duties*: Liability for environmental issues in particular seems to be on the radar of few jurisdictions, although most have provisions that prohibit unfair and deceptive practices.¹⁴⁸ The deterrent effect is present, however, since brokers, like most professionals, do read the disciplinary cases and liability issues in their licensing journals and insurer materials. Perhaps the most significant regulations, however, impose specific additional duties on all brokers, both buyers and sellers, particularly a duty of reasonable inquiry that demands knowledge of potential environmental issues.¹⁴⁹

2. *Unfair Competition and Unfair Trade Practices*: States have two basic versions of “little Federal Trade Commission Acts” that include different combinations of public and private enforcement. While the California Legislature eliminated most private use of the statutes,¹⁵⁰ the leading North Carolina writers on the subject suggest that these statutes are the best avenue for private redress:

In residential as opposed to commercial fact situations, the courts still cling to a legal approach based unrealistically on *caveat emptor* under circumstances where public policy ought to be more protective of a vendee of residential property. Fraud on the part of the vendor or the vendor’s agent becomes very difficult to prove in North Carolina, with negligent misrepresentation a shade easier but still a relative long shot. Proving unfair or deceptive trade practices is often the residential vendee’s most realistic theory. . . . Recent court decisions and the traditional law in this area combine to say that the vendee cannot rely

the seller will not be able to obtain dismissal of a lawsuit based on a motion for summary judgment should the buyer decide to allege that the seller made oral representations concerning the condition of the property. A seller may in the end be able to convince a court that no representations were made, but he may need to suffer an expensive lawsuit to do so.”)

¹⁴⁸ See, e.g., N.C. GEN. STAT. ANN. § 93A-6(a)(1) (Westlaw 2012), discussed in Hetrick, *supra* note 61, §§ 9-11.5(g).

¹⁴⁹ N.C. GEN. STAT. ANN. § 93A-6(a)(1) (Westlaw 2012) (providing that broker can be disciplined for “[m]aking any willful or negligent misrepresentation or any willful or negligent omission of material fact”). See N.C. GEN. STAT. ANN. § 93A-6(a)(8), (10), discussed in Hetrick, *supra* note 61, §§ 9-11.5(g). See also Washburn, *supra* note 10, at 412, 430-31.

¹⁵⁰ Wheaton, *supra* note 117.

too heavily on others even though those others are often professionals hired to assist in the real estate transaction or employed to protect the public generally. It is the contention of the authorities that vendees—at least vendees of residential property—are no longer on equal footing with vendors in terms of matters related to the quality of the property. Vendees in the residential scenario are often lulled into a false sense of security by seller’s agents (who emphasize that they are professionals that can be trusted to properly handle the transaction) and others employed to inspect the property and appraise it. Courts reviewing these fact situations should also consider that in the typical residential fact situation, the buyer is not represented by an attorney at the offer to purchase and sales contract stages of the transaction.¹⁵¹

The reach of these statutes is often far wider than traditional fraud and misrepresentation and they frequently include “unfair and deceptive,” as well as unlawful, practices.¹⁵² However, some state statutes do not permit private recovery for damages.¹⁵³ Examples include: (1) fill;¹⁵⁴ (2) sinking problems;¹⁵⁵ (3) “minor” water problems;¹⁵⁶ (4) noise-proximity of roads and buffers;¹⁵⁷ and (5) misrepresentation of resort amenities.¹⁵⁸

3. *Common Law Liability*: In many jurisdictions, the liability of professionals is more extensive than the liability of sellers, which seems appropriate, since a broker is in the business of knowing how to navigate residential real estate transactions.¹⁵⁹ The broker should have far more knowledge (and the ability to locate information) about a given parcel or area than any party (except someone equally qualified). In such cases, there is a duty to disclose information to prospective buyers¹⁶⁰ that again

¹⁵¹ Hetrick, *supra* note 61, §§ 9-14, at 321-22. See Spears v. Moore, 551 S.E.2d 483 (N.C. Ct. App. 2001) (relating to a perk test supposedly accomplished ten years earlier). See also Belcher v. Fleetwood Enters., Inc., 590 S.E.2d 15 (N.C. Ct. App. 2004); Coley v. Champion Home Builders, 590 S.E.2d 20 (N.C. Ct. App. 2004) (applying the Act to defective mobile home tie-down systems; the only real issue was actual injury arising from the trade practice).

¹⁵² N.C. GEN. STAT. ANN. § 75-1 et seq. (Westlaw 2012); CAL. BUS. & PROF. CODE § 17200 et seq.

¹⁵³ CAL. BUS. & PROF. CODE § 17200 et seq. See Wheaton, *supra* note 117.

¹⁵⁴ Stone v. Paradise Park Homes, 245 S.E. 2d 801 (N.C. Ct. App.), *review denied* 248 S.E.2d 257 (N.C. 1978).

¹⁵⁵ Douglas v. Doub, 383 S.E.2d 423 (N.C. Ct. App. 1989).

¹⁵⁶ Rucker v. Hoffman, 392 S.E.2d 419, 422 (N.C. Ct. App. 1990).

¹⁵⁷ Leake v. Sunbelt Ltd., 377 S.E.2d 285, 289 (N.C. Ct. App. 1989).

¹⁵⁸ Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993); Leake v. Sunbelt Ltd., 377 S.E.2d 285, 289 (N.C. Ct. App. 1989).

¹⁵⁹ Of note is the case of *Michel v. Moore & Assocs., Inc.*, 67 Cal. Rptr. 3d 797, 802-03 (Ct. App. 2007). The trial court held that the agent was a fiduciary and owed a higher standard of care. Hetrick, *supra* note 61, §§ 9-14, at 321-22; Washburn, *supra* note 10, at 396, 412.

¹⁶⁰ See, e.g., N.C. GEN. STAT. ANN. § 93A-6(a)(1) (Westlaw 2012) (providing that a broker

often turns on the arcane distinction between *latent* and *patent* defects.¹⁶¹ Privity seems to be unnecessary in this context.¹⁶² Brokers are usually required to disclose material facts actually known to them rather than to make reasonable inquiry.¹⁶³ Liability can accrue for information provided that is incomplete or incorrect, as well as for responses to direct inquiries that are incomplete or incorrect. Of course, the additional elements of non-disclosure must be satisfied, except in the few jurisdictions that recognize a tort of negligent non-disclosure by a

can be disciplined for “[m]aking any willful or negligent misrepresentation or any willful or negligent omission of material fact”); *see also id.* at § 93A-6(a)(8),(10), as to professional competence, all discussed in Hetrick, *supra* note 61, §§ 9-11.5(g), and Washburn, *supra* note 10, at 412, 430-31. Buyers’ brokers owe a fiduciary duty to exercise due diligence to recognize and pursue issues, and the literature has for decades included warnings to the industry to exercise due care in the acquisition and disclosure of key information. Paula C. Murray, *Past or Present Environmental Contamination: Another Disclosure Duty for a Real Estate Broker?*, 25 REAL EST. L.J. 191, 196 (1996); Constance Frisby Fain, *An Overview of Real Estate Agent or Broker Liability*, 23 REAL EST. L.J. 257 (1995); Arlen R. Gunner, *The Legal and Ethical Duties and Obligations of Real Estate Brokers and Salespersons*, 13 REAL EST. FIN. J. 83 (1997); Clarence Hagglund, et al., *Caveat Misrepresenter: The Real Estate Agent’s Liability to the Purchaser*, 5 HOFSTRA PROP. L.J. 381 (1993); Paul Meyer, *Illinois Real Estate Brokers: The Duties of Disclosure and Accuracy*, 23 LOY. U. CHI. L.J. 241 (1992); Robert Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It’s Not Just for Sellers Anymore*, 68 FLA. B.J. 28 (1994); Paula Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689 (1997); Harris Ominsky, *How to Handle Residential Real Estate Disclosure*, 10 PRAC. REAL EST. LAW. 65 (1994); Guy P. Wolf & Marianne J. Jennings, *Seller/Broker Liability in Multiple Listing Service Real Estate Sales: A Case for Uniform Disclosure*, 20 REAL EST. L.J. 22 (1991); Sally Longroy, *Disclosure Obligations in Real Estate Transactions and Reporting Requirements for Environmental Contamination*, 31 ST. B. OF TEX. ENVTL. L.J. 65, 91 (2001).

¹⁶¹ This duty can exist even when the broker is not acting as a buyer’s broker. “Presently, a growing number of courts require brokers participating in the sale of residential real estate to disclose facts materially affecting the value or desirability of the offered property, so long as the facts are known by the broker, and neither known by the prospective purchaser nor available to her through a reasonable inspection. Any failure to disclose in accordance with that judicially imposed duty constitutes actionable fraud, provided, of course, that the remaining essential elements of culpability, reasonable reliance, causation, and damages can be established by the complaining purchaser. An often-cited leading case concerning a typical real estate broker’s duty of disclosure is *Lingsch v. Savage*, in which the California Court of Appeals stated in 1963 that: [T]he real estate agent or broker representing the seller is a party to the business transaction. In most instances, he has a personal interest in it and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge. . . . whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. He is a party connected with the fraud and if no disclosure is made at all to the agent or broker becomes jointly and severally liable with the seller for the full amount of the damages.” Washburn, *supra* note 10, at 396 (emphasis added).

¹⁶² *Lingsch v. Savage*, 29 Cal. Rptr. 201, 206 (Ct. App. 1963), rejected defenses of lack of privity and lack of fiduciary duty. *See also* Washburn, *supra* note 10, at 398.

¹⁶³ *See* discussion of *Easton v. Strassburger*, *supra* at text accompanying note 89. “The court expressly imposed the obligation upon selling brokers to diligently inspect the property offered for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an inspection would reveal.” Washburn, *supra* note 10, at 401-02. However, the vast majority of jurisdictions have declined to follow *Easton. Id.* at 403-04.

broker.¹⁶⁴ North Carolina's principal commentator on real estate issues would like to see liability extended for negligent misrepresentation. "It would seem that the real estate agent in *Carpenter v. Merrill Lynch Realty* should be held accountable for an innocent but material and false representation."¹⁶⁵ The North Carolina case of *Stanford v. Owens* illustrates in the commercial context what residential brokers should and insurers do fear.¹⁶⁶ The court first found that fraud claims were time-barred but concluded that the same facts constituted essentially the lesser included offense of negligence, which was subject to a longer statute of limitations.¹⁶⁷ Thus the facts properly went to the jury: (1) the plaintiff knew that the defendants had graded and filled an old landfill; (2) the plaintiff specifically inquired about the stability of the lot and was told it was "virgin" soil; (3) the defendants instructed their engineers to prepare reports on the plaintiff's lot and two adjacent lots, but "[i]nstructed the

¹⁶⁴ See discussion of *Easton v. Strassburger*, *supra* text accompanying note 89; Washburn, *supra* note 10, at 397-400.

¹⁶⁵ Hetrick, *supra* note 61, §§ 9-14. See *Winant v. Bostic*, 5 F.3d 767 (4th Cir. 1993) (failure of developer of coastal lots to represent amenities accurately).

¹⁶⁶ *Stanford v. Owens*, 332 S.E.2d 730 (N.C. Ct. App. 1985).

¹⁶⁷ The North Carolina Court of Appeals first discussed the elements from the earlier version of the Restatement:

One who in the course of his business or profession supplies information the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if: (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and (b) the harm is suffered (i) by the person or one of the class of persons for whose guidance the information was supplied, and (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith. Restatement of Torts Section 552 (1938).

Stanford v. Owens, 332 S.E.2d 730 (N.C. Ct. App. 1985).

The RESTATEMENT OF TORTS (SECOND) clarified the responsibilities:

§ 552 Information Negligently Supplied for the Guidance of Others: (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

engineer where to drill and how deep”; and (4) the defendants also had the engineer prepare three reports and gave the plaintiff only that which covered the lot at issue, even though (5) the reports on the adjoining properties showed garbage nearer to the surface than on most of plaintiff’s lot.¹⁶⁸

The problem, viewed from the perspective of our collective seventy-plus years in the field, is that, while many brokers see liability on facts like this, the less obvious (but sometimes more expensive) issues are rationalized away.

IV. THE INFORMATION AGE MARKET-BASED SOLUTION: VOLUNTARY CHECKLIST

Given the disarray, disconnectedness and ineffectiveness of the law throughout the nation, we argue that a straightforward, issue-oriented checklist could alert parties and professionals in a way that can minimize surprises and disputes. Even when the law is on seller’s side, many cases cannot be resolved on pleadings or summary judgment.¹⁶⁹ One of the few common threads that run through many states is that direct inquiry often triggers a legal duty of truthful disclosure on the seller and, to a varying degree, any agents involved. However, buyers seldom seek specific information on environmental issues from sellers. Statutory disclosure may actually lull consumers into a false sense of security, when the right question would deliver pivotal information. Many buyers and sellers do not even know what the issues are or what professionals are available and should be consulted. Because a great deal of public information is available to buyers, sellers may also benefit, at least in jurisdictions where there is some duty of inquiry or due diligence required of those buyers.

The checklist we propose as a basis for further discussion is appended. It is divided into several issue areas that will be of no surprise to anyone with even a passing interest in the field.¹⁷⁰

¹⁶⁸ *Stanford*, 332 S.E.2d at 732-33.

¹⁶⁹ *Roberts*, *supra* note 20.

¹⁷⁰ Professor Washburn: “As most of the existing disclosure legislation provides, all defects in the physical condition of the structure itself should be disclosed. In addition, all items upon which the house is physically dependent should be disclosed, such as site conditions on the lot, drainage, sewer or septic system, water or well, gas, electric, and other utilities. While these items are the bare minimum for disclosure purposes, there may be other items that would be material to the buyer’s decision but which are more judgmental than actual physical condition. For example, should mandatory disclosure include environmental conditions in the area, such as a dump site, inconveniences in the area, such as congested and noisy streets, potential factors, such as a planned new highway near the property, or prejudicial factors such as the close proximity of a group home or low-income housing? Even with regard to physical factors of the house itself, should disclosure

A. PROPERTY INFORMATION

1. Basic identifying information like a property ID or PIN number;
2. Plat, tax map or aerial;
- 3-4. Planning and zoning (target property and area); Setbacks, buffers, easements;
- 5-8. Property survey, covenants, previous ownership (chain of title), topographic, hazard and flood maps;
9. Building plans and permits;
10. Nuisances and limitations on building/rebuilding.

B. GEOLOGY AND LAND FEATURES

1. Health and safety;
2. Flood hazards;
3. Coastal and water issues;
4. Natural hazards like earthquakes, hurricanes, wild fires, tornadoes, winter storms, tsunamis, and landslides;
5. Wetlands;
6. Topography;
7. Soil Stability.

C. ENVIRONMENTAL DATA (ONSITE AND OFFSITE)

1. Outdoor historic toxic and hazardous materials, soil and groundwater contamination;
2. Air quality (health, visibility) and non-attainment status;
3. Water quality (drinking water and surface waters) and closures;
4. Indoor toxic and hazardous materials, including asbestos, radon, lead, mold, VOCs (e.g., formaldehyde), pests and pest treatments;
5. Existing environmental permits and conditions, including restrictions on rebuilding;
6. Health of the property, including plant diseases, and hazards to pets.

D. INSPECTIONS AND STRUCTURE

1. Contamination and any evidence such as staining or odors;
2. Neighbors are great sources of information;

include previous uses of the site, such as industrial use, the health of former occupants, such as an HIV-positive resident, or prior occurrences, such as a grisly murder in the house?" Washburn, *supra* note 10, at 446-48.

3. Specific issues regarding structures, such as roof, foundation, windows, electrical, plumbing, flooring, heating, exterior and grounds (both materials and performance issues).

E. INFRASTRUCTURE

1. Waste systems regarding sewer, septic, system performance (SSOs, etc.);
2. Water system regarding well issues, municipal water sources, treatment on site;
3. Energy sources for heating and for electrical power use; and
4. Power lines, pipelines, easements and transmission lines.

F. NEIGHBORHOOD ISSUES

1. Uses, views, traffic patterns, noises and odors.
2. Disclosure of any significant changes in the past or any anticipated in the future.
3. Tree removal and land clearing.
4. Zoning and planning issues.
5. Landfills, health hazards, toxic releases or remediation in the immediate area.

TABLE OF COMMONLY USED CONSULTANTS

A. POTENTIAL LEGAL EFFECT

This new tool would not require a change to existing disclosure and due diligence requirements. An issue checklist is not specifically intended to alter the relative duties of the parties, but instead provides the basis for both brokers and consumers to decide what the material issues are in a given transaction. While brokers should not be expected to become experts in any of the areas, a checklist would assist in knowing the issues and assisting their customers and clients to identify material issues, as well as options to address them from contracts and inspections through closing and thereafter. Of course there will be questions, such as problems of definition, and we welcome suggestions. As Professor Washburn notes, in the context of *required* disclosure,

Once disclosure goes beyond the structure, the lot, and the utilities serving it, problems of definition abound. The classes of things to disclose are [sic] somewhat dependent on the characteristics of the individual buyer. Obviously, any non-structural or off-site disclosure would be relevant to the extent it affects the “value or desirability” in

a material manner. However, “value,” “desirability” and “material” are all very subjective terms. It is very difficult to define what factors might materially disturb a buyer and what might not. For example, a landfill one mile from the property may bother one buyer but be immaterial to another. Proximity from the property is very subjective and may differ for different types of off-site hazards. Since off-site and non-structural factors are so subjective, it is virtually impossible to legislatively establish parameters for this type of disclosure. Purchasers should bear some responsibility for ascertaining factors affecting the property which may not be to their liking Especially with regard to off-site, neighborhood conditions, buyers should make their own determinations based on what is important to them. It is true that some off-site or non-structural conditions may be difficult for the buyer to discover, but the area is entirely too subjective to lend itself to rational, uniform regulation.¹⁷¹

Although there should be a comprehensive list of basics, voluntary disclosure is tailored to the individual transaction and the buyer’s preferences. The buyer can specify a distance for any hazard that is a concern, such as five miles for a toxic waste dump and twenty-five miles for a nuclear power plant. The model attached at the end of this Article is premised on information exchange: This checklist requests INFORMATION. “PLEASE PROVIDE INFORMATION” is a request to provide information (from any source) in your possession or under your control. This includes information about both conversations and writings that relate to the issue. For example, if you know that Brand X pest control serviced the property and that you have a receipt and product information, you should provide both to the requesting party. If you do not have a receipt, include information about the company and the product. If you do not have either or if it was something you heard from a previous owner, just report accurately.

There is also a specific reference to two key data sources: EPA.gov (“My Environment”), and Scorecard. This is partly for information and partly to meet what may become a reasonably expected duty for sellers, brokers and buyers; that is, to check the official sources as a minimum to meet any burden of inquiry. As Professor Washburn concluded:

If the purpose of mandatory disclosure is to achieve a rational market where essential information is known in advance, there can be no complaint that the furnishing of the information may affect the economics of the transaction. All the statute would do is mandate information. Whether the buyer then decides, based on that

¹⁷¹ Washburn, *supra* note 10, at 448 (footnotes omitted).

information, not to purchase the property, to ask the seller to perform repairs, or to attempt to negotiate a lower price, is properly an issue of negotiation between buyer and seller.¹⁷²

We think the same reasoning applies to voluntary disclosure.

1. *Impacts on Common Law Issues:* There are some areas where the existence of an informational tool could have some effect:

a) *Response to Direct Inquiries:* If buyers do make inquiry, a response could appropriate data sites. If a seller refuses, it may be a reflection of general market conditions (a hot market primarily). At that point, the buyer ought to be on notice to secure experts and proceed with caution. Whether sellers begin to see a benefit to a “Clean CarFax,”¹⁷³ to set them apart in a slower market, remains to be seen. Of course, in many jurisdictions, knowledge of an issue gained through an inquiry could be the practical device that triggers voluntary compliance with existing duties (for example, whether sellers are under an obligation to disclose any information that they already possess or to make reasonable inquiry for either business, regulatory or liability reasons).

b) *Materiality:* This Checklist was designed to address material issues.¹⁷⁴ Sellers or brokers may know of *facts* but may not appreciate that the facts constitute conditions that may actually be significant, or that buyers may be unaware of risks well understood by locals, such as soil conditions, faults, droughts, fires and hurricanes.¹⁷⁵ A checklist could also be useful to assist sellers and brokers in evaluating properties prior to sale, as well as in responding to a buyer’s inquiries.

c) *Justifiable Reliance:* If a buyer is aware of issues but neither investigates nor makes direct inquiry, it may be much more difficult to make a claim for fraud or non-disclosure later unless the seller or broker had knowledge of particular conditions. There is much that is public information and available through the Environmental Protection Agency’s website and Scorecard, for example.¹⁷⁶ There are at least two national services that offer the same basic information provided to

¹⁷² *Id.* at 446.

¹⁷³ The “CarFax®” has become a standard for sales of used motor vehicles and company advertisements touting the benefits of a clean bill of automotive health. See Carfax.com, www.carfax.com/entry.cfx (last visited Aug. 16, 2012).

¹⁷⁴ As Jerry Panz, executive director of the Wilmington Regional Association of REALTORS®, frequently says, “When asked about an issue, respond by asking, ‘Is that important to you?’ If the answer is yes, it becomes a material issue.” Witnessed by one author on at least six occasions.

¹⁷⁵ N.C. ASS’N OF REALTORS®, *supra* note 22, at 5-6.

¹⁷⁶ See USA.gov, www.usa.gov/Agencies.shtml, *supra* note 49; U.S. ENVTL. PROT. AGENCY, epa.gov/ (last visited July 23, 2012) (My Environment, searching by location on home page); and SCORECARD, scorecard.goodguide.com/ (last visited July 23, 2012).

environmental consultants, streamlined for consumers.¹⁷⁷ Professor Washburn concludes that the vagaries augur for mandatory inspection statutes or regulations, and we agree that would help, but at upwards of \$300, we do not think it will happen that quickly.¹⁷⁸ Will buyers' agents need to do so for professional liability reasons? The simple fact is that the information sources are there now, so this tool may alert a party to existing responsibilities.

2. *Statutory Issues*: An informational checklist will provide assistance to brokers and at least one standard to establish issues that warrant inquiry, regardless of the other legal duties of brokers in the jurisdiction. In jurisdictions requiring written disclosure by sellers, a checklist could still supplement the usually perfunctory recitation of environmental issues in the statute or statutory disclosure form. In jurisdictions that require little or no disclosure, a checklist could set the bar for reasonable expectations.

3. *Transactional Issues*: Better information means more productive negotiations for repairs and price reductions. In jurisdictions that allow negotiation of risk via disclaimer, "as is" clauses, exculpatory or integration clauses, the negotiations should be more meaningful and result in fewer post-transaction issues if the parties have equal access to information on material issues. Since most buyers do not consult an attorney before entering into a transaction, better informed participants might begin to utilize professional assistance (of all types) earlier in the process to protect their interests.

B. PRACTICAL IMPACTS

More complete knowledge on the part of all parties should result in a net improvement in environmental awareness, especially since so many environmental issues are directly linked to health, costs and value.¹⁷⁹ Disputes may be minimized or more easily resolved, depending on the jurisdiction, if the parties have easy pre-closing access to information that causes disputes in the first place. Practically, this results in a net

¹⁷⁷ ENVTL. RECORD SEARCH, INC., *supra* note 18 (for all these references); ENVTL. DATA RES. INC., *Solutions For Home Buyers, Sellers & Agents*, www.edrnet.com/solutions-for/home-buyers-sellers--agents (last visited July 23, 2012); ENVTL. DATA RES. INC., *Sample Environmental Issues Report*, www.environmentalissuesreport.com/sample_report.pdf (last visited July 23, 2012); www.web.edrnet.com/ordering/wos/orderproduce/buynow.aspx?lsessguid=72073530-65b4-445f-a965-09e36996eeb2, www.environmentalissuesreport.com/index.aspx?lsessguid=a47c1e73-4b50-4a79-8118-70ca6230e73d; FIRST SEARCH ENVIRONMENTAL INFORMATION, www.efirstsearch.com/index.htm (last visited July 23, 2012).

¹⁷⁸ See Washburn, *supra* note 10, at 440-53.

¹⁷⁹ See *Is Your Home Making You Sick?*, *supra* note 32, at 34-35.

increase in environmental quality. Additionally, hazards will be remedied as parties structure their transaction to incorporate environmental costs rather than adding a surprise deal-killer at the end. Hazardous materials, or USTs, could be removed either before sale or during the contract period. Treated wood products, lead, asbestos or other problem materials could be removed or replaced. If the property is near a hazmat disposal site or nuclear power plant and those are deal breakers for the buyer, the facts should be readily and quickly available. Furthermore, new business opportunities could even result. Firms will be required to perform modifications so that the costs can be wrapped into financing. Other firms currently offer services to mine data, consult on environmental issues, and provide green construction advice and materials, as well as designing and building according to green building tenets.¹⁸⁰

V. CONCLUSION

Buyers want to know more about environmental conditions. We forecast that for a reasonable price, residential buyers will be able to secure something like a vehicle history report on their most important investment. That process may become the “All Appropriate Inquiry” of residential real estate.¹⁸¹ Until then, we offer the attached checklist for discussion.

EXHIBIT A

RESIDENTIAL REAL ESTATE ENVIRONMENTAL CHECKLIST¹⁸²

The environmental checklist is intended to identify environmental issues that affect the health, safety and value in RESIDENTIAL real estate transactions. The goal is to alert you to the issues and questions to ask.

Be sure to consult the local governmental agencies (cities, counties,

¹⁸⁰ Cutting et al., *supra* note 20 (a review of EPA, Walmart and NGO efforts to provide information on compliance and enforcement as well as product lifecycle footprints to consumers and investors). See services offered by ENVTL. RECORD SEARCH, INC., *supra* note 177; ENVTL. DATA RES. INC., *Solutions For Home Buyers, Sellers & Agents*, *supra* note 177; FIRST SEARCH ENVIRONMENTAL INFORMATION, *supra* note 177. See also Wendy Koch, *Green Building Takes Off in Real Estate Slump*, USA TODAY, Sept. 8, 2010, content.usatoday.com/communities/greenhouse/post/2010/09/green-building-takes-off-in-real-estate-slump/1#.T6-u7VKvPz0.

¹⁸¹ See AM. SOC’Y FOR TESTING MATERIAL, ASTM §§ 1527-1528, www.astm.org/Standards/E1527.htm, and www.astm.org/Standards/E1528.htm (last visited Aug. 8, 2012).

¹⁸² Copyright Robert H. Cutting & Lawrence B. Cahoon, May 13, 2012.

towns) for information on your area of interest. The Environmental Protection Agency's website (EPA.gov, "Where you Live") and Scorecard.org are a good place to start, and USA.gov should lead you to your local government. Professionals in the field stress the importance of *talking with neighbors* in any real estate purchase decision. In addition, since most real estate transactions are accomplished through either buyers' or sellers' brokers, it is important to *ask the brokers* about any issue which concerns you. Please also be aware that not all issues are involved in all properties.

This is only a checklist. We recommend consulting technical, financial and legal consultants even before you locate property if you can, so you can quickly obtain information that you may not be able to get yourself. A suggested list is included in this Article in Part I, Section A, sub-part 2, at sub-section a) *Informational Tools*. IT IS STRONGLY RECOMMENDED THAT ALL PROPERTIES BE INSPECTED BY QUALIFIED AND LICENSED HOME INSPECTORS (ask if they are insured).

This checklist requests INFORMATION. "PLEASE PROVIDE INFORMATION" is a request to provide information (from any source) in your possession or under your control. This includes information about conversations as well as any writings that relate to the issue. For example, if you know that Brand X pest control serviced the property and that you have a receipt and product information, you should provide both to the requesting party. If you do not have a receipt, include the information as to the company and the product. If you do not have either or if it was something you heard from a previous owner, just report accurately. If there is a cost involved, the parties should negotiate the cost (each item can vary widely in price).

The standard is, "Do unto others as you would have them do to your children and grandchildren."